93-518

No. _____

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

Petition For Writ Of Certiorari To The Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case squarely presents the question of when this Court's opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) permits property owners, who desire legitimate use of their lands – reasonable and beneficial uses which meet all standards for approval – to be singled out by local government to finance the costs of providing public recreation, service and transportation facilities for that jurisdiction's residents. This question is present in almost every one of the vast array of municipal exactions imposed on new development by cities, counties, and special districts, not only throughout the State of Oregon, but also throughout the United States.

Petitioner Florence Dolan – owner of the A-Boy Plumbing supply store on Main Street in Tigard, Oregon – together with her late husband, John Dolan, brought this action against the City of Tigard, contending the city's imposition of exactions on them violated the 5th Amendment to the U.S. Constitution by failing to substantially advance a legitimate state interest. During site development review of the Dolans' proposal to raze their existing store and build a new, larger store on their property, the city made findings that failed to directly and substantially demonstrate the increased intensity of the Dolans' use required the exactions. Disregarding the Dolans' argument that such findings were mandated by this Court's decision in *Nollan*, 483 U.S. at 834 n.3, 841 (1987), the city required them to dedicate to the city 7000 square feet of their commercial property as a condition of approval of their development.

QUESTIONS PRESENTED FOR REVIEW – Continued

The Oregon Supreme Court, affirming the judgment of the Oregon Court of Appeals and the Oregon Land Use Board of Appeals, held the city's exactions were not an unconstitutional taking because the federal constitutional takings/exactions standard of scrutiny does not require a substantial relationship between the adverse impacts of proposed use and government-imposed exactions, and the exactions imposed by the city were reasonably related to the adverse impacts of the Dolans' new store. The questions presented are:

1. Where a permit exaction is challenged as a taking, does *Nollan* require a "substantially related" degree of judicial scrutiny of the exaction and its "essential nexus" to the impacts of a proposed development, rather than the "reasonably related" degree of scrutiny used by the Oregon Supreme Court?

2. Where a permit exaction is challenged as a taking, did the Oregon Supreme Court err in holding that a legally sufficient nexus exists when the local government makes findings that its imposed exactions are reasonably related to the increased intensity in use of the subject property, even though those findings are at best merely *ipse dixit*, and at worst demonstrate only a potential increase in intensity of use, rather than a bona fide impact directly caused by the development?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding. In the proceedings below, John Dolan, husband of Petitioner Florence Dolan, was also a Petitioner, together with Florence Dolan. Mr. Dolan is now deceased, and is survived by his widow, Florence Dolan.

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DECISIONS BELOW

The decision of the Oregon Supreme Court is reported at 317 Or. 110, 854 P.2d 437 (1993), and is reproduced as Appendix (App.) A. The Appellate Judgment of the Oregon Supreme Court (SC No. S39393, filed July 28, 1993) is reproduced as Appendix B. The decision of the Oregon Court of Appeals is reported at 113 Or. App. 162, 832 P.2d 853 (1992), and is reproduced as Appendix C. The decisions of the Oregon Land Use Board of Appeals are reported at 22 Or. LUBA 617 (1992) and 20 Or. LUBA 411 (1991) and are reproduced as Appendices D and E respectively. The Notice of Appellate Judgment of the Oregon Land Use Board of Appeals (LUBA No. 91-161,

filed August 9, 1993) is reproduced at Appendix F. The relevant portions of Resolution 91-66, the Final Order of the City of Tigard (city), dated September 17, 1991, incorporating by reference Final Order 91-09 PC of the City of Tigard Planning Commission, dated July 15, 1991, are reproduced at Appendix G. Page references are to the version in the appendix.

JURISDICTION

The decision of the Oregon Supreme Court, review of which is sought on petition, was entered on July 1, 1993, and appellate judgment was entered on July 28, 1993. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

The statutes at issue are Oregon Revised Statutes (ORS) 197.010 (1991) and 197.175 (1991). The administrative rules at issue are Oregon Administrative Rule (OAR) 660-15-000(5), Open Spaces, Scenic and Historic Areas,

and Natural Resources (1975) and OAR 660-15-000(12), Transportation. The relevant portions of the statutes are set out at Appendix H, and the relevant portions of the goals are set out at Appendix I.

The ordinances at issue are the City of Tigard Comprehensive Plan, Volume 2, revised December, 1987 (plan), and Title 18 of the City of Tigard Community Development Code, revised February, 1989 (CDC). The relevant portions of these ordinances are set out at Appendices J and K, respectively.

Page references are to the versions in the appendix.

STATEMENT OF THE CASE

A. Procedural History

This action was originally filed with the Oregon Land Use Board of Appeals (LUBA)[1], and appealed the decision of the City of Tigard, imposing exactions during site development review, as violating the Federal Constitution. LUBA denied the appeal, holding the constitutional claim was not ripe because of failure to pursue a variance. Petitioner, together with her late husband, John T. Dolan, then reapplied to the city, seeking a variance. When the City Council, on September 19, 1991, denied their variance application, the Dolans again appealed to LUBA, reasserting their federal Constitutional claim.

[1] LUBA is an administrative hearings body consisting of 3 attorneys, appointed by the Oregon Governor, with exclusive jurisdiction over appeals of land use decisions made by local governments.

LUBA denied the Dolans' federal takings claim. From that decision, an appeal was taken to the Oregon Court of Appeals. On May 20, 1992, the Court of Appeals upheld the decision of LUBA. The Dolans in turn sought review by the Oregon Supreme Court. That court granted review, and, after oral argument on January 11, 1993, entered its *en banc* decision on July 1, 1993, affirming the judgment of the Oregon Court of Appeals. Justice Peterson wrote a dissent from the court's decision.

B. The Case

This is an inverse condemnation action. The property owner, Florence Dolan, contends that the decision of the City of Tigard (City), applying provisions of the City's Community Development Code (CDC) and imposing exactions during site development review, takes her property for public use without payment of just compensation.

Mrs. Dolan is the owner of a 1.67 acre commercial lot on Main Street in the City of Tigard, on which there is an existing 9700 square foot building used for the operation of a retail electric and plumbing supply store. The lot is contiguous to Fanno Creek, a small stream which runs adjacent to the lot. Part of the property is within the creek's 100-year floodplain. Mrs. Dolan, and her late husband, proposed to build a larger, 17,600 square foot, building, better suited to the needs of their business, and to raze the existing 9700 square foot building. *Dolan v. City of Tigard*. App. D-3.

In 1973, the State of Oregon adopted a statute requiring cities and counties to adopt comprehensive land use

plans in compliance with statewide land use goals developed by the state's Land Conservation and Development Commission (LCDC), an administrative agency created to direct and administer the state's land use regulatory system. Cities and counties were also required to adopt land use regulations to implement their comprehensive plans. App. H-2.

The LCDC, in 1975, developed statewide land use Goal 5 to conserve open space and protect natural and scenic resources. That goal required cities and counties to provide programs to protect, *inter alia*, "[l]and needed or desirable for open space." The Goal defined open space as including "any land area that would, if preserved and continued in its present use," "protect streams," "enhance the value to the public of neighboring parks . . . or other open space," and "enhance recreation opportunities." App. I-1. In 1975, the LCDC also adopted statewide land use Goal 12 to provide and encourage a safe, convenient and economic transportation system. Cities and counties were required to prepare transportation plans that "consider all modes of transportation including . . . bicycle and pedestrian," and to "avoid principal reliance on any one mode of transportation." App. I-4.

The city, in compliance with state law, and in conformance with the state land use goals, thereafter adopted a comprehensive land use plan, last revised in November, 1983. That plan included a finding that the city would develop policies to retain "a vegetative buffer along streams and drainageways, to reduce runoff and flood damage and provide erosion and siltation control." App. J-1. The policy adopted by the city to implement

that finding required, along Fanno Creek, "[t]he dedication of all undeveloped land within the 100-year floodplain plus sufficient open land for greenway purposes specifically identified for recreation within the plan." App. J-1, 2. The city described the land to be dedicated as "the backbone of the open space system." App. J-2. Finally, the plan's transportation section established that "[t]he City shall review each development request adjacent to areas proposed for pedestrian/bike pathways to . . . require the necessary easement or dedications for the pedestrian/bicycle pathways." App. J-2.

To implement these plan provisions, the city revised its zoning ordinance, Title 18 of its CDC, in February of 1989. That code, at Section 18.120.180.A.8, provided, for approval of site development plans for development in and adjacent to 100-year floodplains, the city shall "require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/ bicycle plan." App. K-1.

When the Dolans applied for site development review, the city, pursuant to CDC § 18.120.180.A.8, required the Dolans to dedicate to the city: (1) all of the portions of their lot lying within the 100-year floodplain, for use by the city as a greenway; and, (2) an additional 15 foot strip of property adjacent to and above the 100 year flood plain, for use for future reconstruction of a storm drainage channel and as a public pedestrian and bicycle pathway, and additionally to construct that pathway. App. D-6. The total land required to be dedicated

was approximately 7000 square feet, or about 10% of the total 1.67 acre parcel, of which 3600 square feet fell above the flood plain boundary. The Dolans argued these exactions were unconstitutional and sought a variance from them. In denying the variance, the city rejected their constitutional arguments.

There was, however, no direct, evidentiary linkage between the development of the Dolans' new store and the exacted dedications. The city's findings justified the greenway exaction by determining additional stormwater runoff, resulting not only from the Dolans' development, but also from "elsewhere within the Fanno Creek drainage basin, is expected to increase flow within the creek" and concluded the public needs the "ability to make channel modifications in this area to offset the increase in stream flow." App. G-40. The findings also justified the pedestrian and bicycle pathway dedications, by determining they were "reasonably related to the applicant's request to intensify the development of this site" because it was "reasonable to assume that customers and employees of the future uses of this site could u[illegible]lize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." App. G-24.

On review, the Oregon Supreme Court affirmed the decisions of LUBA and the Oregon Court of Appeals, which had rejected the Dolans' constitutional takings claim.[2] The court below stated that the city's site development review exactions were not a taking because the

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[2] In the majority opinion in the court below, Justice Van Hoomissen stated "Petitioners . . . did not challenge the

transportation impacts of, and the storm water runoffs from, the Dolans' new larger store, were reasonably related, respectively, to the requirements to dedicate land for a pedestrian and bicycle pathway, and a greenway. The court rejected the Dolans' alternative contention the "cause and effect" relationship or "essential nexus" of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) required a "substantial relationship" between the impacts of the development and the mitigation requirements. App. A-13. The Dolans' had also argued these exactions bore no relationship to their development because the same, identical, exactions were required of every development, regardless of size or intensity. The court disregarded this contention. *See* App. A-20 (Peterson, J., dissenting).

The court additionally rejected the argument that the exactions, imposed to permit the public to traverse the pedestrian and bicycle pathways, were a permanent physical occupation and a taking *per se* under the rule in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and reiterated in *Yee v. City of Escondido*, 503 U.S. ___, 112 S. Ct. 1522 (1992) (where government authorizes a physical occupation of property, or actually takes title, the takings clause generally authorizes compensation). Instead, the court held: "Such dedication conditions are not *per se* takings, because the occupation may occur only

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adequacy of the city's . . . findings or their evidentiary support in the record." App. A-7. However, the Dolans argued at every level of appeal below that the city's findings are not legally "sufficient to establish the requisite relationship between the impacts of the proposed development and the exactions imposed . . ." *Id.*

with the owner's permission. Petitioners may avoid physical occupation of their land by withdrawing their application for a development permit." App. A-11 n.8.

Justice Peterson dissented from the court's decision. In his view, the city failed to establish even a reasonable relationship between the impacts of the Dolans' use and the dedications imposed on them. He asserted he "would require [city] findings that *demonstrate* that the increased intensity of the use requires the exaction." App. A-25 (Peterson, J., dissenting) (emphasis in original).

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort, or of a Federal Court of Appeals. Under Rule 10.1(c), a ground for review exists when a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. All four of these grounds for review are present in this case.

I.

THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT – HOW FAR CAN GOVERNMENTS GO IN EXACTING DEVELOPMENT DEDICATIONS TO SECURE PUBLIC IMPROVEMENTS?

The precedent established by the decision below throws the door wide open to a whole array of creative new development dedications to satisfy long-planned public improvements. Mrs. Dolan is not responsible to provide parkland, storm drainage, and pedestrian and bicycle pathways for the people of the city and, therefore, she cannot be singled out to bear the burden of completing the city's long-standing plans for greenways, storm drains, and pathways.

Exactions imposed as a condition to receiving a development permit can result in a regulatory taking in violation of the Fifth Amendment. *Nollan, supra*. The takings test applied in *Nollan* was whether the permit condition " 'substantially advance[s] legitimate state interests.' " *Id.*, 483 U.S. at 834 (brackets in original). For a development permit to meet this test, there must be an "essential nexus" between the permit condition and the adverse impacts of the proposed development. *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting) (must have a "cause and effect relationship between the property use . . . and the social evil"). In the absence of a cause-and-effect relationship, or "essential nexus," the permit condition is not a legitimate regulatory action but a means of "extortion" which works a taking in violation of the Fifth Amendment. *Nollan*, 483 U.S. at 837.

In his dissent below, Justice Peterson of the Oregon Supreme Court made clear the majority of the court had made a decision that was not based on an "essential nexus."

> From reading [the city's] order in this case, I am convinced Tigard decided that it needed a pedestrian/bicycle pathway and a flood control easement along Fanno Creek. One way of getting these, free of cost, is by requiring all owners who propose to change the use of their property to convey the easements to the city. That is what happened in this case.
>
> The findings here do not establish any cognizable remediable purpose attributable to the [Dolans' proposed] change in use. The conditions relating to the pedestrian/bicycle pathway and flood control and greenway easements are impermissible on the record made in this case.

App. A-29, 30 (Peterson, J., dissenting).

The Oregon Supreme Court's majority had concluded that the dedication provisions imposed by the city were "reasonably related to the impact of the expansion of their business." App. A-16. In making this conclusion, that court disregarded the admission of the city, in oral argument, that the conditions, that the petitioners dedicate a part of their land for a greenway and pedestrian/bicycle pathway, bore no relationship whatsoever to the scope or intensity of the impacts of the petitioners' proposed use. The presiding judge of the panel of the Oregon Court of Appeals asked counsel for the city: "The ordinance does not require any relationship between the work to be done by permit and the dedication of the

property?" Counsel for the city responded: "That's correct . . . " Audio R. Tape, *Dolan v. City of Tigard*, 113 Or. App. 162, 832 P.2d 853 (1992), argue 4-13-92, Cue No. 40.

The record also fails to disclose any "reasonable relationship." Even though the city's asserted relationship between the greenway exaction and the impact of the demolition and reconstruction of the petitioners' building is recited as being "reasonably related," the real underlying city purpose in requiring the petitioners to dedicate greenway land is: (1) To further the objectives of the city's *Master Drainage Plan*; and, (2) to provide for the physical relocation and expansion of the Fanno Creek channel to accommodate stormwater runoff from additional other development projected in the drainage basin. App. G-38, 39.

There is no evidence in the record that the greenway property exacted from petitioners is even reasonably related to any hypothetical increase in stormwater runoff caused by demolishing a 9700 square foot structure, and replacing it with a 17,600 square foot structure. The city's requiring the dedication of petitioners' land, and the construction of a pedestrian/bicycle pathway, also bears no reasonable relationship to the impacts of their proposed development. There is no "reasonable relationship" between the impacts on public pedestrian and bicycle movement created by the demolition and reconstruction of the retail sales building, and the requirement that the Dolans dedicate their private property to the city for a pedestrian/bicycle pathway.

The city's justification for this dedication was merely a subterfuge. The findings of the city's planning commission, adopted by the city council in its decision, found the

exactions reasonably related to the development of the site, found it reasonable to assume and reasonable to expect the development would have anticipated transportation impacts, and concluded the exactions could offset some of those impacts. App. G-24.

The "reasonable" "expectations" and "anticipations" in the city's findings were nothing more "than an exercise in cleverness and imagination." *Nollan*, 483 U.S. at 841. There was no reasonable relationship between the city's conditions and the impacts of the petitioners' proposed use. By virtue of the Oregon Supreme Court's decision, the city was authorized to exact, from Mrs. Dolan, land to help complete an already existing, and partially completed, greenway and pathway systems by what Justice Scalia termed "an out-and-out plan of extortion." *Id.* at 837 (citations omitted).

The city's true purpose in requiring dedication of the petitioners' land for, and construction of, a pedestrian/bicycle pathway was to achieve general public benefit[3], not to offset the current and future adverse effects of the demolition and reconstruction of the retail sales building. The city's comprehensive plan required outright dedication regardless of impacts, or the lack thereof. App. G-25.

In sum, the decision of the Oregon Supreme Court below, made under the federal Constitution's Fifth Amendment, sanctions the city's requirement that the

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[3] The record makes clear that the dedication was intended to meet "the City's adopted policy of providing a continuous pathway system intended to serve the general public good." App. G-26.

Dolans dedicate their land for a greenway and a pedestrian/bicycle pathway, and then construct that pathway. That decision disregards the city's clear intent to secure public improvements by forced dedications, and was made in spite of the city's failure to demonstrate any specific relationship between the impacts of either storm-water runoff or pedestrian and bicycle use and demolishing and then replacing the petitioners' retail sales building. The city has admitted as much.

Holding the city's conclusory and speculative findings to meet the "essential nexus" of *Nollan* is tantamount to sanctioning essentially every municipal exaction where the government staff can hypothesize some remote or indirect, cumulative adverse consequence of development. The city's findings are grossly inadequate when compared to those found by the Court of Appeals for the Ninth Circuit to satisfy the "essential nexus" of *Nollan*. In *Commercial Builders v. Sacramento*, 941 F.2d 872, 873 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992), the city's impact fee exaction ordinance, found to be constitutional, was supported by a detailed study by an outside consultant that identified the specific impacts generated by new developments in terms of numbers of new low-income workers and the government financial burden, in thousands of dollars, per worker. The exaction was set based on that exhaustive study.

In the instant case, Justice Peterson, dissenting from the Oregon Supreme Court's opinion, described the inadequacy of the city's findings, giving as an example the justification of the dedication for the greenway and storm drainage: "All these findings establish is that there will be some increase in the amount of storm water runoff

from the site. A thimbleful? The constitution requires more than that." App. A-26 (Peterson, J., dissenting). If the city had, by a study, determined how much storm water entered Fanno Creek, and specifically how much more runoff would be caused by the Dolans' new store, it might have been able to constitutionally justify the dedication for the storm drain and greenway. It made no such study. If it had, by a study, determined the number of additional pedestrians, bicyclists, and automobiles the new store would generate, and how those numbers compared to the existing traffic loads on city streets, sidewalks, and bikepaths, it might have been able to justify the pedestrian and bikepath dedication. It made no such study.[4]

In the absence of such detailed studies supporting specific city findings of direct impacts, the court's opinion below licenses a creative and cost-free method of providing public recreation, storm drainage, and transportation improvements – extort the land for those improvements from development applicants.

In his dissent to the decision of the Oregon Supreme Court in *Dolan*, Justice Peterson argued for heightened scrutiny of such exaction schemes: "I read the federal

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[4] The city's conclusory findings "justify" the dedication of the land within the 100-year floodplain of Fanno Creek for a greenway on the basis of storm water runoff and increased flows in the creek, even though a principal purpose of the greenway was recreation. *See* App. J-1, 2. However, the city totally failed to justify how a new plumbing store was even rationally related to the dedication of greenway land for public recreation.

precedents to require a high threshold that the government must meet in showing the exaction is needed because of intensified land use by the landowner." App. A-29 (Peterson, J., dissenting). The majority of the Oregon Supreme Court rejected that standard, and, by doing so, distorted the "essential nexus" of *Nollan* beyond recognition, depriving it of all vitality and meaning.

Cities will always need parks, storm drain improvements and transportation systems. If building a new commercial building is accepted as a sufficient nexus to impose on the developer the dedication of land, and construction of facilities, based on theoretical and hypothesized findings, without any direct relationship to the actual impacts of the new building, then there is no meaning to "essential nexus." All public improvements are remotely and tangentially related to new commercial buildings. The decision below sets a dangerous and far-reaching precedent by allowing cities to extort public improvements, planned and codified years before in master plans, by exacting those improvements from landowners seeking to develop their properties, just because those properties are in proximity to the sites planned for the improvements. According to the Oregon Supreme Court, those exactions meet constitutional scrutiny even if unrelated to the direct consequences of proposed developments. Petitioner respectfully urges this Court to grant the Petition to establish that local governments must justify conditions of approval by explicit findings showing those conditions are directly attributable to the specific impacts of a proposed development.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT, AND OTHER STATE AND FEDERAL COURTS, REGARDING THE DEGREE OF SCRUTINY IN TAKINGS/EXACTION CASES

A. The Ruling of the Oregon Supreme Court Conflicts with Precedent Set by This Court in *Nollan* and *Yee*.

The Oregon Supreme Court has sanctioned a nexus standard which disregards the necessary cause-and-effect relationship required by *Nollan* to impose development dedications, and has adopted a construction of *Yee* that deprives of all meaning and vitality this Court's *Loretto* decision governing *per se* takings for permanent physical occupations of private property.

1. *Nollan* Requires a "Substantially Related" Degree of Scrutiny.

By adopting a "reasonably related" degree of scrutiny, the court below, despite the Dolans' argument, ignored this Court's *Nollan* precedent that the "essential nexus" requires a heightened degree of scrutiny – a "substantially related" connection between the proposed development and the adverse public impacts occasioned by that development. App. A-9-13.

The nexus approved by the court below is one which utterly fails to establish a substantial relationship between a proposed project and the adverse public impacts which a permit condition is designed to alleviate. Indeed, the nexus analysis conducted by the City of

Tigard did not even attempt to establish that the Dolans' dedication of land was directly and proximately necessitated by the stormwater runoff and additional pedestrian and bicyclist traffic which their enlarged commercial facility would engender. All the city could find was the dedication was "reasonably related" to the stormwater runoff and pedestrian and bicyclist traffic that *would be expected* to be caused by the new facility. This Court's *Nollan* majority's holding on the nexus requirement establishes a heightened level of scrutiny for the cause and effect relationship between development impacts and conditions of approval. This heightened level of scrutiny was clearly delineated by Justice Scalia, responding to the dissent of Justice Brennan[5]:

> Even if the [California Coastal] Commission had made the finding that JUSTICE BRENNAN proposes, however, it is not certain that it would suffice. *We do not share JUSTICE BRENNAN's confidence that the Commission "should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access," post* at 862, that will avoid the effect of today's decision. We view the Fifth Amendment's Property Clause to

[5] In dissent, Justice Brennan had argued: "The Court's insistence on a *precise fit between the forms of burden and condition on each individual parcel* along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate." 483 U.S. at 847 (Brennan, J., dissenting) (emphasis added). He later characterized the *Nollan* Court's opinion as an "unusual demand for a precise match between the condition imposed *and the specific type of burden on access created by the appellants*." *Id.* at 849 (emphasis added).

> be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction . . . .

Nollan, 483 U.S. at 840-841 (emphasis in original).

Justice Scalia thus made it apparent that a heightened level of scrutiny must be applied in determining the constitutionality of development exactions – there must be demonstrated a specific connection between permit conditions and impacts. The Oregon Supreme Court disregarded this principle.

In view of the Oregon Supreme Court's construction of the nexus requirement, it is of great importance to the citizens of the United States, and of the State of Oregon, that this Court grant this Petition, and establish uniformly that a precise fit is constitutionally required between an exaction and the burdens or impacts of proposed development, in order to meet this Court's *Nollan* nexus standard.

2. *Nollan, Yee* and *Loretto* Hold that Permanent Physical Occupations Resulting from Exactions Imposed on Development Applications Are *Per Se* Takings.

This Court has made clear that physical invasions of private property violate the Fifth and Fourteenth Amendments to the U.S. Constitution. When the government either permanently occupies, or requires property owners

to allow third parties to permanently occupy private property, and does not compensate owners of that property for the occupation, the government has taken private property in violation of the federal Constitution. *Loretto*, 458 U.S. at 427 (when physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred). *Yee*, 112 S. Ct. at 1526 (where government authorizes a physical occupation of property, or actually takes title, the takings clause generally authorizes compensation). *Nollan*, 483 U.S. at 831-832 (taking occurs when permanent physical occupation is achieved by individuals being given permanent right to traverse private real property). A permanent physical occupation is a *per se* taking in violation of the federal constitution. As such, the "intrusion [is] of such an 'unusually serious character' that it constitutes a taking 'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.' " Peterson, *The Takings Clause*, 77 Calif. L. Rev. 1299, 1333 (1989) (footnotes omitted).

The city, by requiring the petitioners to dedicate their private land for a public greenway and pedestrian and bicycle pathway, has invaded, and permanently occupied, the property of the petitioners. The city's interference with the petitioners' property is with the petitioners' right to exclude others from that property, and that interference is achieved by forcing the dedication of land for a the greenway and pathway. Just as in the public access easement in *Nollan*, the public, on foot and on bicycle, will pass across the petitioners' land. This Court, in *Nollan*, recognized it would be unconstitutional under the Federal Constitution for government, either dependent

on, or independent of, development proposals, to compel landowners to accede to the outright physical occupation of their private lands by the public. *Nollan*, 483 U.S. at 831.

The decision of the Oregon Supreme Court, that there was no physical invasion because the Dolans voluntarily assented to the occupation of their land by applying to expand their plumbing store, misconstrues this Court's decision in *Yee* and ignores this Court's holding in *Nollan*. In construing *Yee*, the court below analogized the Dolans' situation to that of the petitioners in *Yee*, the mobile home park owners: "Because the park owner in *Yee* could have evicted the tenants and used the property for another purpose, any physical invasion that might occur would not be the result of forced acquiescence." App. A-11 n.8. The court concluded there was no unconstitutional permanent physical occupation because the Dolans "may avoid physical occupation of their land by withdrawing their application for a development permit." *Id.*

This construction is contrary to this Court's *Yee* decision. In *Yee*, where a rent-control ordinance was challenged on its face, this Court rejected the petitioners' claim of physical invasion because "no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by government." *Yee*, 112 S. Ct. at 1528. However, this Court also observed: "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* at 1529.

It is precisely that compulsion over objection which is at issue in the instant case. The city is applying a regulation, which, on its face, requires the Dolans, if they want to build a new store, to allow the public to permanently traverse and occupy 7000 square feet of previously private property on which the Dolans had an unconditional right to exclude others. Here the city compelled the Dolans to give up more than an easement for the permanent passage and occupation by the public. The city compelled the Dolans to relinquish their fee simple interest and dedicate that property to the city outright. Such compulsion is a *per se* taking in violation of the Fifth Amendment.

Furthermore, in *Nollan* this Court made it clear that "the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary 'exchange,' that we found to have occurred in *Monsanto*. *Nollan*, 483 U.S. at 834 n.2 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984)).

Thus, it was plain error for the Oregon Supreme Court to conclude there was no taking in violation of the Fifth Amendment, due to permanent physical occupation of the Dolans' private property, merely because the city, in its plan and ordinance, had made dedication of private property, for the public to occupy and traverse, a condition of development approval. In no way can the Dolans be said to have voluntarily assented to such occupation merely because they had made a development application to which that condition applied. The situation is no different than that addressed by this Court in *Nollan*. Even though the Nollans could have avoided the exaction

imposed by the California Coastal Commission by withdrawing their permit application, this Court nonetheless found the commission's exaction to impose an unconstitutional permanent physical occupation of their land.

It is patently outrageous to conclude, as the Oregon Supreme Court did, that an otherwise blatantly unconstitutional restriction under the Fifth Amendment may avoid being held unconstitutional merely by being attached to a permit as a condition of approval. An unconstitutional restriction attached to a permit would not survive judicial scrutiny if it were a restriction on free speech, or free exercise of religion, or the right to due process.

B. The Decision Below Conflicts with Interpretations of *Nollan* by Both Federal and State Courts.

The decision of the Oregon Supreme Court directly conflicts with decisions of other state courts that have interpreted the nexus required between conditions and impacts in light of the *Nollan* decision.

A broad application of the "substantial advancement" standard by the highest court in New York State was presented in *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), where the New York Court of Appeals interpreted *Nollan* as requiring "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships." *Id.* at 1068. *See also Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1276 (Mass. 1992) (requirement that regulation substantially advance a state interest

may express higher standard of scrutiny than rational basis test).

Another case that interprets *Nollan* as requiring a "substantial relationship" between impacts and exactions is *Surfside Colony v. California Coastal Commission*, 226 Cal. App. 3d 1260 (1991). In *Surfside*, the California Court of Appeal determined that *Nollan* "changed the standard of constitutional review in takings cases." *Id.* at 1270. It held that the new standard should "be described as 'substantial relationship,' or 'heightened scrutiny,' " and that "it is clear the rational basis test . . . no longer controls." *Id. See also Batch v. Town of Chapel Hill*, 376 S.E.2d 22 (N.C.App. 1989), *rev'd on other grounds* 387 S.E.2d 655 (N.C. 1990) (to substantially advance state interest, condition imposed must be proportionately related to impact of development).

The decision of the Oregon Supreme Court also conflicts with a decision by a panel of the Court of Appeals for the Ninth Circuit, and decisions by the U.S. District Courts for Nevada, and the Northern District of Illinois, cases all construing this Court's decision in *Nollan*. *See Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 582-583 (9th Cir. 1991) (relationship between the means and the ends must be closer for the purposes of takings clause analysis than for due process analysis). *See also Leroy Land Dev. v. Tahoe Regional Planning Agency*, 733 F. Supp. 1399, 1401 (D.Nev. 1990), *rev'd* 939 F.2d 696 (9th Cir. 1991) (fairly close nexus required between regulatory conditions and burden created by proposed development); *Amoco Oil Co. v. Village of Schaumburg*, No. 91 C 4973, 1992 WL 229591 (N.D.Ill. Sept. 11, 1992) (actual

dedication of property merits strictest scrutiny in reviewing nexus between need served by dedication condition and public burden created by development project).

III.

THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY AMONG THE FEDERAL COURTS AND STATE COURTS OF LAST RESORT REGARDING THE HEIGHTENED DEGREE OF SCRUTINY IN TAKINGS/EXACTION CASES

State courts from New York and Massachusetts to California, and federal courts in Nevada, Illinois and California, have all construed this Court's *Nollan* opinion to require heightened scrutiny, or a "substantial relationship," between development conditions and the burdens or impacts of a proposed development.

On the other hand, the Supreme Court of New Jersey, the U.S. District Court for the District of Oregon, and a panel from the Court of Appeals for the Ninth Circuit[6], have held, as the Oregon Supreme Court did below, that *Nollan* does not command a heightened degree of scrutiny; there need only be a "reasonable relationship," akin to the "rational basis" scrutiny in due process cases, between conditions and development impacts. In 1992, the Supreme Court of New Jersey held that, in determining whether a regulatory restriction substantially advanced a legitimate state interest, there was required a substantial relationship between a legitimate government

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[6] A different panel from the Ninth Circuit's 3-judge panel that decided *Azul Pacifico, supra*.

interest and the regulatory restrictions, but the adverse impacts of development need only be "reasonably determined on adequate evidence to be . . . inimical to . . . [the legitimate government interest]." *Bernardsville Quarry v. Bernardsville Borough*, 608 A.2d 1377, 1383-1384 (N.J. 1992).

In *Pengilly v. Multnomah County*, 810 F.Supp. 1111, 1113 (D.Or. 1992), the District Court held this Court's decision in *Nollan* did not require that individual proposed developments must be shown to have deleterious impact before conditions can be imposed on them. The District Court upheld a local government policy that required dedication of additional right of way to the county as a condition of approval of every new residence on a road.

In *Commercial Builders*, Judge Schroeder, writing for a panel of the Ninth Circuit, held the system-development charge ordinance of the City of Sacramento was not unconstitutional because

> The burden assessed against the developers . . . bears a *rational relationship* to a public cost closely associated with such development. . . .
>
> . . . .
>
> *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld.

941 F.2d at 874-875.

Thus, Judge Schroeder held there must only be a rational relationship between the exaction imposed on a development and the "public cost" or "social ill" caused by the development. *Id.* at 874.

It was this same 3-judge panel of the Ninth Circuit that, a month before making its decision in *Commercial Builders*, reversed the *Leroy Land* decision, *supra*, of the U.S. District Court for the District of Nevada, in *Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696 (9th Cir. 1991) (there must be substantial relationship between exactions and the stated government interest, not the development's impacts).

These cases show there is a distinct split of opinion, not only between state courts of last resort, but between federal courts, and, indeed, even between different panels of the Ninth Circuit, regarding this Court's "essential nexus" holding in *Nollan*. The direct conflict presented by these cases on such a significant issue should be resolved by this Court.

IV.

THE HEIGHTENED SCRUTINY ISSUE IS AN IMPORTANT QUESTION OF LAW WHICH SHOULD BE SETTLED BY THIS COURT

In order for the nation's lower courts to properly adjudicate takings claims that land use decisions fail to substantially advance a legitimate state interest, it is critical they apply correct degree of scrutiny to the "essential nexus." Indeed, the level of scrutiny is the key factor in determining whether the Fifth Amendment's Takings

Clause provides protection to property owners from government exaction schemes. This is clearly shown by the decision below, where the Oregon Supreme Court's use of a "reasonably related" level of review easily led to a decision upholding the dedication exaction even though the alleged nexus was only hypothetical and speculative. Any close reading of the record, like that conducted by Oregon Supreme Court Justice Peterson, dissenting, establishes that a cause and effect nexus never existed.

This Court, in *Nollan*, characterized the government's abuse of its permitting authority as an extortion and a leveraging of the police power. *Nollan*, 483 U.S. at 837. This Court also has made clear that the protection of private property is essential to maintain all other civil rights protected by the U.S. Constitution. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Lower courts are never going to prevent regulatory abuses by government, and provide essential protection to private property, if they do not give heightened scrutiny to the substance of the government's action. The instant case illustrates the need for an "essential nexus" of a "substantial relationship" between the local government's permitting conditions and the specific adverse impacts of a development. The split of authority concerning the appropriate degree of scrutiny under the Takings Clause cries out for resolution by this Court – it is a matter of exceptional importance, and merits review by this Court.

CONCLUSION

The City of Tigard's comprehensive plan and land use regulations are intended to achieve completion of the city's greenway and pedestrian/bicycle pathways, parts of which have already been acquired by the city, by extorting land from persons proposing any kind of development near Fanno Creek. This is done without regard to the impacts of that development. Nonetheless, completing the city's park and transportation system is a responsibility of the city's residents as a whole. Property owners who desire legitimate use of their lands – reasonable and beneficial uses which meet all standards for approval – should not be singled out to finance the costs of providing public recreational and transportation facilities for the city's residents.

In upholdi. g the city's scheme, the Oregon Supreme Court overlooked the very purpose of the Federal Constitution's Takings Clause. That purpose is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan*, 483 U.S. at 835-836 n.4 (citation omitted). The decision of the court below completely ignores this purpose.

This case has been closely watched by property owners and builders who are already heavily burdened with an array of permit conditions. The precedent established by the Oregon Supreme Court licenses the extortionate activities of local governments operating under comprehensive plans and land use regulations. The extent to which property owners can be subjected to provision of public improvements as conditions of

approval for developments is an issue of exceptional importance and wide-ranging impact.

Petitioner respectfully urges this Court to grant the Petition for Writ of Certiorari.

DATED: September 29, 1993.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

John T. DOLAN
and Florence Dolan,
Petitioners on Review,

v.

CITY OF TIGARD,
Respondent on Review.

(LUBA 91-161; CA A73769; SC S39393)

In Banc

On review from the Court of Appeals.*

Argued and submitted January 11, 1993.

David B. Smith, Tigard, argued the cause and filed the petition for petitioners on review.

James M. Coleman, of O'Donnell, Ramis, Crew & Corrigan, Portland, argued the cause and filed the response for respondent in review.

Daniel J. Popeo and Paul D. Kamenar, Washington, D.C., and Gregory S. Hathaway, of Garvey, Schubert & Barer, Portland, filed a brief *amicus curiae* for Washington Legal Foundation.

Timothy J. Sercombe and Edward J. Sullivan, of Preston, Thorgrimson, Shidler, Gates, & Ellis, Portland, filed a brief *amicus curiae* for 1000 Friends of Oregon.

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* Judicial review from Land Use Board of Appeals, 22 LUBA 617 (1992). 113 Or App 162, 832 P2d 853 (1992).

Ronald A. Zumbrun and Robin L. Rivett, Sacramento, California, and Richard M. Stephens, Bellevue, Washington, filed a brief *amicus curiae* for Pacific Legal Foundation.

VAN HOOMISSEN, J.

The decision of the Court of Appeals and the order of the Land Use Board of Appeals are affirmed.

Peterson, J., dissented and filed an opinion.

VAN HOOMISSEN, J.

Petitioners in this land use case seek review of a Court of Appeals' decision affirming a Final Opinion and Order of the Land Use Board of Appeals (LUBA) in favor of respondent City of Tigard (city). *Dolan v. City of Tigard*, 113 Or App 162, 832 P2d 853 (1992). The issue is whether city has demonstrated the required relationship between the conditions that it attached to its approval of petitioners' proposed land use and the expected impacts of that land use.[1] Petitioners argue that, because city failed to demonstrate an "essential nexus" or a "substantial relationship" between the exactions demanded by city and the impacts caused by their proposed development, city's exactions constitute a "taking" under the Fifth Amendment of the federal constitution.[2] City responds

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[1] In land-use cases, this sometimes is called the relationship between the "exactions" and the "impacts."

[2] The Takings Clause of the Fifth Amendment to the Constitution of the United States provides:

> "[N]or shall private property be taken for public use, without just compensation."

that it need only show a "reasonable relationship" between the imposition of the conditions and the legitimate public interest advanced. For the reasons that follow, we affirm the Court of Appeals' decision.

Petitioners own 1.67 acres of land in downtown Tigard. The land is within city's "central business district" zone and is subject to an "action area" overlay zone (CBD-AA zone). The land's current use is as a retail electric and plumbing supply business, a general retail sales use.

Petitioners applied to city for a permit to remove an existing 9,700-square foot building and to construct a 17,600-square foot building in which to relocate the electric and plumbing supply business and to expand their parking lot (phase I). Petitioners eventually intend to build an additional structure and to provide more parking on the site (phase II); however, the exact nature of that additional expansion is not specified. Petitioners' proposed intensified use (phase I) is permitted outright in the CBD zone; however, the AA overlay zone, which

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That Clause is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Penn Central Trans. Co. v. New York City*, 438 US 104, 122, 98 S Ct 2646, 57 L Ed 2d 631 (1978). *See* Annot, *Supreme Court's View As to What Constitutes a "Taking" Within Meaning of Fifth Amendment's Prohibition Against Taking of Private Property For Public Use Without Just Compensation*, 89 L Ed 2d 977 (1988).

Petitioners also brought a challenge under Article I, section 18, of the Oregon Constitution (Takings Clause). Before this court, however, they expressly have limited themselves to a federal claim. Therefore, we do not address any Oregon constitutional issue.

implements the policies of the Tigard Community Development Code, allows city to attach conditions to the development in order to provide for projected transportation and public facility needs.

City granted petitioners' application, but required as conditions that petitioners dedicate the portion of their property lying within the 100-year floodplain for improvement of a storm drainage system and, further, that they dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.[3] Petitioners sought a variance from those conditions, which city denied.[4]

In its 27-page final order, city made the following pertinent findings that petitioners do not challenge concerning the relationship between the dedication conditions and the anticipated impacts of petitioners' project:

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[3] City's decision includes the following relevant condition:

> "1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (*i.e.*, all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area."

The dedication required by that condition comprises about 7,000 square feet, or approximately 10 percent of the subject real property.

[4] The applicants requested variances to Community Development Code standards requiring among other things dedication of area of the subject parcel that is within the 100-year floodplain of Fanno Creek and dedication of additional area adjacent to the 100-year floodplain for a pedestrian/bicycle path.

> "*Analysis of Variance Request*. The [City of Tigard Planning] commission does not find that the requirements for dedication of the area adjacent to the floodplain for greenway purposes and for construction of a pedestrian/bicycle pathway constitute a taking of applicant's property. Instead, the Commission finds that the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.
>
> " * * * * *
>
> "At this point, the report will consider the applicant's request from the requirement to dedicate

portions of the site within the 100-year floodplain of Fanno Creek for storm water management purposes. The applicant's *Statement of Justification for Variance* * * * does not directly address storm water draining concerns * * * .

"The Commission does not find that the requirements for dedication of the area within the floodplain of Fanno Creek for storm water management and greenway purposes constitutes a taking of the applicant's property. Instead, the Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site, thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, * * * the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." City of Tigard Planning Commission Final Order No. 91-09 PC at 13, 20-21.

On petitioners' appeal, the Tigard City Council approved the Planning Commission's final order.

Petitioners appealed to LUBA. They did not challenge the adequacy of city's above quoted findings or their evidentiary support in the record. Rather, petitioners argued that city's dedication requirements are not related to their proposed development and, therefore, that those requirements constitute an uncompensated taking of their property under the Fifth Amendment.

In considering petitioners' federal taking claim, LUBA assumed that city's findings about the impacts of the proposed development were supported by substantial evidence. *Dolan v. City of Tigard*, 22 Or LUBA 617, 626 n 9 (1992). Accordingly, LUBA considered only whether those findings were sufficient to establish the requisite relationship between the impacts of the proposed development and the exactions imposed, *i.e.*, do city's findings support city's action? LUBA stated:

> "Petitioners do not contend that establishing a greenway in the floodplain of Fanno Creek for storm water management purposes, and providing a pedestrian/bicycle pathway system as an alternative means of transportation, are not legitimate public purposes. Further, petitioners do not challenge the sufficiency of the 'nexus' between these *legitimate public purposes* and the *condition* imposed requiring dedication of portions of petitioners' property for the greenway and pedestrian/bicycle pathway. Rather, petitioners' contention is that under both the federal and Oregon Constitutions, the relationship between the *impacts* of the proposed development and the *exactions* imposed are insufficient to justify requiring dedication of petitioners' property without compensation." *Id.* at 621 (emphasis in original).

LUBA concluded:

> "In view of the comprehensive Master Drainage Plan adopted by respondent providing for use of the Fanno Creek greenway in management of storm water runoff, and the undisputed fact that the proposed larger building and paved parking area on the subject property will increase the amount of impervious surfaces and, therefore, runoff into Fanno Creek, we conclude there is a 'reasonable relationship' between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway.
>
> "Furthermore, the city has adopted a Comprehensive Pedestrian/Bicycle Pathway Plan which provides for a continuous network of pedestrian/bicycle pathways as part of the city's plans for an adequate transportation system. The proposed pedestrian/bicycle pathway segment along the Fanno Creek greenway on the subject property is a link in that network. Petitioners propose to construct a significantly larger retail sales building and parking lot, which will accommodate larger numbers of customers and employees and their vehicles. There is a reasonable relationship between alleviating these impacts of the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation." *Id.* at 626-27.

LUBA held that the challenged conditions requiring dedication of portions of petitioners' property did not constitute an unconstitutional taking under the Fifth Amendment. *Id.* at 627.

The Court of Appeals affirmed, rejecting petitioners' contention that in *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), the Supreme Court had abandoned the "reasonable relationship" test for a more stringent "essential nexus" test. *Dolan v. City of Tigard, supra*, 113 Or App at 166-67.[5]

On review,[6] petitioners first argue that city must meet a higher standard than a "reasonable relationship,"

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[5] In *Nollan*, the California Coastal Commission conditioned a permit to the plaintiffs to replace a bungalow on their beachfront lot with a larger house on allowing a public easement to go across their beach, which was located between two public beaches. The California Court of Appeals had found that there was no taking, because the condition did not deprive the landowners of all reasonable use of their property. In an opinion written by Justice Scalia, the *Nollan* majority concluded that none of the designated purposes was substantially advanced by preserving a right to public access:

> "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to view the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house." *Nollan v. California Coastal Comm'n*, 483 US 825, 838-39, 107 S Ct 3141, 97 L Ed 2d 677 (1987).

[6] We review pursuant to ORS 197.850(9), which provides:

> "The court may affirm, reverse or remand the order. The court shall reverse or remand the order only if it finds:
>
> "(a) The order to be unlawful in substance or procedure, but error in procedure shall not be cause for reversal or remand unless the court shall find that

that there must be an "essential nexus" or "substantial relationship" between the impacts of the development and the dedication requirements; otherwise, imposing exactions as a condition of land use approval is an unconstitutional taking. They rely on *Nollan v. California Coastal Comm'n, supra.*[7] Petitioners argue that, because city has not demonstrated an essential nexus between its exactions and the demands that petitioners' proposed use will impose on public services and facilities, the requisite substantial relationship is missing and, therefore, that the exactions imposed on them by city constitute a taking

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substantial rights of the petitioner were prejudiced thereby;

"(b) The order to be unconstitutional; or

"(c) The order is not supported by substantial evidence in the whole record as to the facts found by the board under ORS 197.830(13)."

[7] In *Nollan*, the Supreme Court stated:

"Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements." 483 US at 834-35 (footnote omitted).

The Supreme Court generally has eschewed any "set formula" for determining when and under what circumstances a given regulation would be seen as going "too far" for purposes of the Fifth Amendment, preferring to engage in essentially *ad hoc*, actual inquiries. *Lucas v. So. Carolina Coastal Council*, 505 US ___, 112 S Ct 2886, 120 L Ed 2d 798 (1992); *see McDougal v. County of Imperial*, 942 F2d 668, 677-78 (9th Cir 1991) (takings analysis involves essentially *ad hoc*, factual inquiries).

under the Fifth Amendment. As a fallback position, petitioners argue that city cannot demonstrate even a "reasonable relationship" between their development's impacts and city's exactions.[8]

City responds that the "reasonable relationship" test which was widely applied in regulatory takings cases before the Supreme Court's decision in *Nollan* was not abandoned in *Nollan*. Under that test, city asserts, the dedication conditions that it imposed on petitioners do not constitute a taking under the Fifth Amendment.

A land-use regulation does not effect a "taking" of property, within the meaning of the Fifth Amendment

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[8] Petitioners also argue that, because city's dedication conditions would require permanent physical occupation of a portion of their property, they amount to a *per se* taking. That argument is not well taken. Such dedication conditions are not *per se* takings, because the occupation may occur only with the owner's permission. Petitioners may avoid physical occupation of their land by withdrawing their application for a development permit.

The Supreme Court's analysis in *Yee v. City of Escondido*, 503 US ___, 112 S Ct. 1522, 118 L Ed 2d 153 (1992), settles this point. In *Yee*, the owner of a mobile home park asserted a *per se* taking when the local city council adopted a rent control ordinance that, as the park owner argued, transferred a discrete interest in land from the park owner to his tenants. The *Yee* court held:

"The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.' " 118 L Ed 2d at 165 (emphasis in original).

Because the park owner in *Yee* could have evicted the tenants and used the property for another purpose, any physical invasion that might occur would not be the result of forced acquiescence. *Ibid.*

prohibition against taking private property for public use without just compensation, if it substantially advances a legitimate state interest and does not deny an owner economically viable use of the owner's land. *Nollan v. California Coastal Comm'n, supra,* 483 US at 835-36; *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 US 470, 495, 107 S Ct 1232, 94 L Ed 2d 472 (1987); *Agins v. City of Tiburon,* 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980). Requiring an uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, *Nollan, supra,* 483 US at 834.

Before the Supreme Court's decision in *Nollan,* federal and state courts struggled to identify the precise connection that must exist between the conditions incorporated into a regulation and the governmental interest that the regulation purports to further if the regulation is to be deemed to "substantially advance" that interest. In the midst of a range of tests set forth by various courts, the Ninth Circuit Court of Appeals concluded in *Parks v. Watson,* 716 F2d 646, 652 (9th Cir 1983), that, at the very least, a condition requiring an applicant for a governmental benefit to forego a constitutional right is unlawful if the condition is not rationally related to the benefit conferred. By way of example, the *Parks* court discussed "subdivision exaction" cases, where a city allows a developer to subdivide in exchange for a contribution. In such cases, the court noted, "there is agreement among the states 'that the dedication should have some reasonable relationship to the needs created by the subdivision.' " *Id.* at 653. Thus, under the *Parks* analysis, exactions and impacts must be "reasonably related." In *Parks,* the court held that the exactions had "no rational relationship to

any public purpose related to the [impacts of the development]" and, therefore, that the exactions could not be required without just compensation. *Id.* at 653.

In *Nollan,* the Court did not purport to abandon the generally recognized "reasonably related" test and, in fact, noted that its approach was "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." 483 US at 839 (citing a long list of exaction cases, beginning with *Parks v. Watson, supra*). The *Nollan* court stated:

> "We can accept, for purposes of discussion, the Commission's proposed test [the 'reasonably related test'] as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailored standards." *Id.* at 838.

Thus, we are unable to agree with petitioners that the *Nollan* court abandoned the "reasonably related" test.[9]

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[9] We are not alone in interpreting *Nollan* in this manner. In *Commercial Builders v. Sacramento,* 941 F2d 872 (9th Cir 1991), *cert den* 112 S Ct 1997 (1992), the Ninth Circuit also held that *Nollan* did not demand any different level of scrutiny than the one it used in *Parks v. Watson, supra:*

> "As a threshold matter, we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to this Ordinance. The *Nollan* Court specifically stated that it did not have to decide 'how close a "fit" between the condition and the burden is required' * * * . It also noted that its holding was 'consistent with the approach taken by every other court [*sic*] has considered the question,' citing *Parks* as the lead case in its string cite. * * *

We recognize, however, that the *Nollan* court's application of that test does provide some guidance as to how closely "related" exactions must be to impacts. For example, the *Nollan* court stated that the evidence constitutional propriety of an exaction disappears

> "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury." *id.* at 837.[10]

"We therefore agree that *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld." *Id.*, 941 F2d at 874-75.

[10] In *Nollan*, the Supreme Court said:
"We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." 483 US at 841.

Petitioners read that passage as indicating that in *Nollan* the Supreme Court abandoned the "reasonably related" test for a more stringent "essential nexus" test.[11] We do not read *Nollan* that way.

The quoted passage indicates that, for an exaction to be considered "reasonably related" to an impact, it is essential to show a nexus between the two, in order for the regulation to substantially advance a legitimate state interest, as required by *Agins v. City of Tiburon, supra,* 447 US at 260. In *Nollan,* the Court stated that, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Nollan v. California Coastal Comm'n, supra,* 483 US at 837 (citations omitted). *Nollan,* then, tells us that an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve. *See Dept. of Trans. v. Lundberg,* 312 Or 568, 578, 825 P2d 641, *cert den* 113 S. Ct. 467 (1992) (sidewalk dedication requirement serves the same legitimate governmental purposes that would justify denying permits to develop commercially zoned properties).

See Lucas v. So. Carolina Coastal Council, supra, 120 L Ed 2d at 813 (the Fifth Amendment is violated when land use regulation does not substantially advance legitimate state interests or denies an owner all economically viable use of land).

[11] The term "substantial relationship" is not used in *Nollan,* although the Court did cite *Agins v. City of Tiburon,* 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980), for the proposition that a regulation must "substantially advance legitimate state interests." *Nollan, supra,* 483 US at 834.

In this case, we conclude that city's unchallenged factual findings support the dedication conditions imposed by city. The pedestrian/bicycle pathway condition had an essential nexus to the anticipated development because, as the city found in part.

> "the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." *Dolan v. City of Tigard, supra,* 22 Or LUBA at 622 (quoting City of Tigard Planning Commission Final Order at 20).

We are persuaded that the transportation needs of petitioners' employees and customers and the increased traffic congestion that will result from the development of petitioners' land do have an essential nexus to the development of the site, and that this condition, therefore, is reasonably related to the impact of the expansion of their business.

Because the development would involve covering a much larger portion of petitioners' land with buildings and parking, thus increasing the site's impervious area, the condition requiring petitioners to dedicate a portion of their property for improvement of a storm drainage system also is reasonably related to the impact of the expansion of their business. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. We hold that there is an essential nexus between the increased

storm water runoff caused by petitioners' development and the improvement of a drainage system to accommodate that runoff.

We agree with LUBA's conclusion that the challenged condition requiring dedication of portions of petitioners' property is not an unconstitutional taking of petitioners' property in violation of the Fifth Amendment.

The decision of the Court of Appeals and the order of the Land Use Board of Appeals are affirmed.

PETERSON, J., dissenting.

Petitioners own a commercial building in the business district of Tigard. They sought permission to replace an existing building with a larger building. The City of Tigard imposed two conditions to the granting of a building permit: one was that petitioners convey a 15-foot easement adjacent to the east bank of Fanno Creek for "storm water management and greenway purposes"; the other was that petitioners convey an 8-foot easement for a pedestrian/bicycle pathway. Petitioners appealed, asserting a violation of the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment provides in part that "private property [shall not] be taken for public use, without just compensation." This case principally involves questions of federal law. The majority states the issue as follows:

> "The issue is whether city has demonstrated the required relationship between the conditions that it attached to its approval of petitioners' proposed land use and the expected impacts of that land use." 317 Or at 112.

Development exactions such as those involved in the present case are not unusual. Over the years, a body of law has developed that permits governments, acting under their police power, to accomplish some things that also could be accomplished under their eminent domain powers. Roberts, *Mining with Mr. Justice Holmes*, 39 Vand L Rev 287 (1986).[1] Local governments, in the exercise of their federal police power and without payment of compensation, have been authorized to require developers to grant easements, make payments, or give up rights as a condition to the development of their property.

The federal rule that applies to such exactions has two facets. First, the exaction must serve a legitimate state purpose. Second, the exaction must be reasonably necessary to address problems, conditions, or burdens created by the underlying change of use of the landowner's property. *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 667 (1987). The second facet requires a showing that the development created a need for the exaction. If a recited need for an exaction is only an excuse for what actually is a taking, the exaction is invalid.

As does the majority, I place the burden of proving these two elements on the government that exacts the conditions. In establishing that the need for the exactions arises from an increased intensity of use, the government

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[1] A note in the Boston University Law Review contains an excellent historical overview of exactions. *See* Note, " *'Take' My Beach Please!*": Nollan v. California Coastal Commission *and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 BUL Rev 823, 848-49 (1989).

must show more than a theoretical nexus. It must show that the granting of the permit probably will create specific problems, burdens, or conditions that theretofore did not exist, and that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise from the granting of the permit. More than general statements of concern about increased traffic or public safety are required to support, as permissible regulation, what otherwise would be taking. The *Nollan* opinion states:

> "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a *'substantial* advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." 483 US at 841.

Here, Tigard had two possible ways to obtain the easements. The first, and less desirable from the city's view, was to condemn the easements. That would require payment of compensation under either the state or

federal constitution.[2] A second possible way to obtain the easements is by making the granting of them a condition to the granting of a permit.

I am satisfied that the city has met the first test, that the exactions serve a legitimate state purpose. The pivotal issue is whether the second requirement – that the need for the exactions arises from increased intensity of use – has been established. For the answer to this question, the court should look at the city's order to determine whether its findings of fact demonstrate a need for the exactions ordered by the city.[3]

The city's order makes repeated references to other city ordinances that contemplate the creation of a floodplain greenway and a pedestrian/bicycle pathway. The order suggests that such exactions were to be attached to *all* requests for improvements. For example:

> "Code Section 18.86.040 contains interim standards which are to be addressed for new developments in the CBD-AA zone. These requirements are intended to provide for projected transportation and public facility needs of the area. *The City may attach conditions to any*

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[2] Article I, section 18, of the Oregon Constitution, provides in part:

> "Private property shall not be taken for public use * * * without just compensation * * *."

In this court, petitioners make no claim under the Oregon Constitution.

[3] Petitioners do not contest the sufficiency of the evidence to support the findings of fact.

development within an action area prior to adoption of the design plan to achieve the following objectives:

" * * * * *

"b. The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designed bike paths or adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:

"i. Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bike paths identified in the comprehensive plan. * * *

" * * * * *

"A bicycle/pedestrian path is called for in this general location in the City of Tigard's parks Master Plans (Murase and Associates, 1988) and the Tigard Area Comprehensive Pedestrian/Bicycle Pathway Plan 1974). In addition, Community Development Code Section 18.120.180.A.8 requires that *where landfill and/or development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/bicycle plan*. The proposed development site includes land within the 100 year floodplain of Fanno Creek.

" * * * * *

"It is imperative that a continuous pathway be developed in order for the paths to function as an efficient, convenient, and safe system. Omitting a planned for section of the pathway system, as the variance would result in if approved, would conflict with Plan purposes and result in an incomplete system that would not be efficient, convenient, or safe. The requested variance therefore would conflict with the City's adopted policy of providing a continuous pathway system intended to serve the general public good and therefore fails to satisfy the first variance approval criterion.

" * * * * *

"As noted above, approval of the variance request would have an adverse effect on the existing partially completed pathway system because a system cannot fully function with missing pieces. if this planned for section is omitted from the pathway system, the system in this area will be much less convenient and efficient. If the pedestrian and bicycle traffic is forced onto City streets at this point in the pathway system because of this missing section, pedestrian and bicycle safety will be lessened. * * *

" * * * * *

"Code Section 18.120.180.A.8 requires that *where landfill and/or development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/bicycle plan.* * * *

" * * * * *

" * * * As already noted, the code at Section 18.120.080.A.8 and many other related sections (e.g., Section 18.84.040.A.7) require dedication of floodplain areas, not only for construction of pathways, but primarily to allow for public management of the storm water drainage system. * * *

" * * * *In order to accomplish these public improvements related to increasing the flow efficiency of Fanno Creek, dedication of the area of the subject site within the 100-year floodplain and also the adjacent five feet is imperative.* Not requiring dedication of this area as a condition of development approval, as the applicant's variance proposal requests, would clearly conflict with purposes and policies of the Comprehensive Plan, Community Development Code, and the City's *Master Drainage Plan.*" City of Tigard Planning Commission Final Order No. 91-09PC, pp 9-22 (1991) (emphasis added).

The quoted sections show the resolve of the city to get the easements and the purpose for the easements. However, the quoted sections of the order in no way establish that the easements necessarily are needed because of increased intensity of use of petitioners' (or anyone else's) property. Unquestionably, omission of the easements from any of the planned floodwater or pathway developments would "result in an incomplete system." But that is beside the point. If all that need be shown is that easements are needed for a legitimate public purpose, the constitutional protection evaporates. The critical question before us is whether the order shows an increased intensity of such magnitude that it creates the need for the exaction of the easements.

The following findings specifically relate to increased intensity of use in connection with the pedestrian/bicycle pathway easement:

> "[T]he Commission finds that the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed." *Id.* at 13.

Whether the first sentence of the quoted material is viewed as a legal conclusion or a finding of ultimate fact, it must be supported by findings of fact. Supporting findings are lacking. The sentence beginning with "It is reasonable to assume" is speculation, not a finding. Moreover, it states the obvious. If a pathway were built, of course customers and employees "could utilize [the pathway] for their transportation and recreational needs." Concerning the third sentence, the fact that the plans contain a reference to a bicycle rack does not establish increased intensity of use (particularly because other city ordinances require, as was required in this case, provision for bicycle parking in the plans).

The city did make some specific findings relevant to the pedestrian/bicycle pathway:

> "In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." *Ibid.*

The real issue is whether the findings that a larger building is being constructed and the two sentences of the quoted findings are sufficient to support the pathway exaction. I maintain that if the city is going to, in effect, take a portion of one's property incident to an application for a permit to develop the property, the findings of need arising from increased intensity of use must be more direct and more substantial than those. The findings of fact that the bicycle pathway system "*could* offset some of the traffic demand" is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand. (Emphasis added.) In essence, the only factual findings that support the pedestrian/bicycle pathway exaction are these: A larger commercial building is to be constructed and, as a result, there is anticipated to be "additional vehicular traffic." That is not enough to support what amounts to a virtual taking of petitioners' land. I would require findings that *demonstrate* that the increased intensity of use requires the exaction. These findings do not establish that the pathway exaction is needed because of any higher intensity of use.

I turn to the flood control and greenway easement. The factual conclusion asserted to support this exaction reads as follows:

> "The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would ad to the need for public management of the Fanno Creek floodplain, the Commission finds that the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." *Id.* at 21.

Those findings do not establish such an increased intensity of use as to require the exaction of the flood control and greenway easement. All that these findings establish is that there will be some increase in the amount of storm water runoff from the site. A thimbleful? The constitution requires more than that.

Jurisprudence lags behind the times. It is its nature to react, rather than to act. Today, forces of change are at work that challenge traditional "takings" law, forces that jurisprudence has not yet had time to accommodate. Those forces coalesce into a single phenomenon: increasing interdependence among us. There are more of us, we

live closer together, and we are increasingly interconnected. That phenomenon is not going to change except, perhaps, to accelerate.

With respect to "takings" jurisprudence, two essentially opposing tendencies emerge. The first is a tendency to recognize the legitimacy of attempts by state and local governments to regulate private property in ways that once might have been unthinkable. No person has the same range of possible uses for real property that he or she once may have had, because many uses that once were possible now may be forbidden because of their palpable impact on others. In truth, by regulation, governments regularly and permissibly take private property for public use without compensation.[4]

The second tendency – to some extent an outgrowth of the first – is that state and local governments attempt to further particular goals by placing limitations on uses of private property that only will be lifted if the property owners "dedicate" some portion of their property to the

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[4] "For a long time, there has been no Just Compensation Clause in constitutional law. Three words, 'for public use,' have been cut away from it, treated as if they prescribed a distinct command of their own. Instead of the Just Compensation Clause as written, we have a *Takings Clause* engulfed in confusion and a *Public Use Clause* of nearly complete insignificance.

"This strange breach is never remarked on. It is simply presupposed, most clearly, by those who complain about the toothlessness of the 'Public Use Clause' in modern doctrine. Their complaint is an old story: it has to do with the line of Supreme Court decisions in which the public-purpose requirement received its current, broad construction." Rubenfeld, *Usings*, 102 Yale LJ 1077, 1078-79 (1993) (footnotes omitted; emphasis in original).

particular government program. The temptation, particularly in times of limited tax revenues, is to place the primary burden for funding projects on the shoulders of those whose private property happens to be in the neighborhood of the proposed projects, whether or not the projects bear any relationship to the property or to the uses to which the property is put.

The first of these tendencies seems benign and, even if it were otherwise, it would be inevitable. Some private property rights are going to have to bend, if our increasingly interdependent society is to continue to evolve and progress peacefully. The second tendency is an attempt at licensed extortion. The trouble is, what once would have been recognizable as extortion may turn, in time, into something considered benign because it is so familiar. That transmogrification is encouraged every time a court cannot distinguish whether a particular governmental regulation falls within the ambit of the second tendency, rather than the first.

In cases involving exactions attached to permits, hearings are held, evidence is taken, and findings are made, and the government must show why the development spawns the need for exaction. The findings relating to the need for exactions arising from future increased intensity of use after the property is developed must establish more than a *potential* increase in intensity; they must establish more than *some* increase in intensity; they must establish a bona fide need for the extraction that arises from the development.

Because this case turns on federal law, the majority and I rely on the same federal precedents. Why, then, do

we arrive at different results? Under current federal law, if a local government follows the procedures mandated by federal law, it can, incident to the regulation of use of land, take large part of the owner's ownership rights, so long as there remains *some* economically feasible private use. *Lucas v. So. Carolina Coastal Council*, 505 U.S. ___, 112 S Ct 2886, 120 L Ed 2d 798, 815 n 8 (1992). As the *Lucas* opinion itself states, landowners who lose 95 percent of the beneficial use of their property are entitled to no compensation, whereas landowners who lose all beneficial use fully are compensated. *Ibid.*

That power of the government gives it tremendous leverage against landowners who seek to improve their property. Because of the profound potential adverse effects that the substantive rule places on landowners, I read the federal precedents to require a high threshold that the government must meet in showing that the exaction is needed because of intensified land use by the landowner. It is not enough for a government to read the latest pertinent decision of the Supreme Court of the United States and insert in its order "magic words" from the decision (such as "the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site"). If in the fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely *why* the need in fact exists is a modest burden to place on the government. Such precision is lacking in this order.

From reading the order in this case, I am convinced that Tigard decided that it needed a pedestrian/bicycle pathway and a flood control greenway easement along

Fanno Creek. One way of getting these, free of cost, is by requiring all owners who propose to change the use of their property to convey the easements to the city. That is what happened in this case.

The findings here do not establish any cognizable remediable purpose attributable to the change in use. The conditions relating to the pedestrian/bicycle pathway and flood control and greenway easements are impermissible on the record made in this case. I therefore dissent.

APPENDIX B

APPELLATE JUDGMENT

FILED: July 1, 1993

IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN T. DOLAN and FLORENCE DOLAN,

Petitioners on Review,

v.

CITY OF TIGARD,

Respondent on Review.

(LUBA 91-161; CA A73769; SC S39393)

In Banc

On review from the Court of Appeals.*

David B. Smith, Tigard, attorney for petitioners on review.

James M. Coleman, Portland, attorney for respondent on review.

Daniel J. Popeo and Paul D. Kamenar, Washington, D.C., and Gregory S. Hathaway, Portland, filed a brief *amicus curiae* for Washington Legal Foundation.

Timothy J. Sercombe and Edward J. Sullivan, Portland, filed a brief *amicus curiae* for 1000 Friends of Oregon.

Ronald A. Zumbrun and Robin L. Rivett, Sacramento, California, and Richard M. Stephens, Bellevue, Washington, filed a brief *amicus curiae* for Pacific Legal Foundation.

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* Judicial review from Land Use Board of Appeals, 22 LUBA 617 (1992). 113 or App. 162, 832 P2d 853 (1992).

VAN HOOMISSEN, J.

The decision of the Court of Appeals and the order of the Land Use Board of Appeals are affirmed.

Peterson, J., dissented and filed an opinion.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent on review

[ ] No costs allowed.

[X] Costs allowed, payable by: Petitioners on review

MONEY JUDGMENT
Judgment #1

Creditor: CITY OF TIGARD

Debtor: JOHN T. DOLAN and FLORENCE DOLAN

Costs:	$160.00*	*$60.00 of this amount to be paid to:
Attorney Fees:	-0-	STATE COURT ADMINISTRATOR
TOTAL:	$160.00	

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment Effective Date: July 28, 1993

SUPREME COURT (seal)

APPENDIX C

Argued and submitted April 13, affirmed May 20, reconsideration denied July 29, petition for review allowed October 27, 1992 (314 Or 573)
See later issue Oregon Reports

John T. DOLAN
and Florence Dolan,
Petitioners,

v.

CITY OF TIGARD,
Respondent.
(LUBA 91-161; CA A73769)

832 P2d 853

Developers petitioned for judicial review of decision of the Land Use Board of Appeals affirming conditions on development. The Court of Appeals, Richardson, P.J., held that there was direct and reasonable relationship between conditions that city attached to its approval of intensified use and impacts and public needs to which use would give rise.

Affirmed.

1. EMINENT DOMAIN – Nature, extent, and delegation of power – what constitutes a taking; police and other powers distinguished – Relating to zoning, planning, or land use

In determining whether condition on development constitutes a taking, court inquires whether there is legitimate governmental interest that regulation establishing the condition is designed to serve, whether regulation and condition substantially advance that interest, and

whether there is reasonable relationship between impacts or public needs that result from development and conditions that may be attached to its approval to ameliorate or respond to those impacts and needs. US Const. Amend V; Or Const, Art I, § 18.

2. Eminent domain – Nature, extent, and delegation of power – What constitutes a taking; police and other powers distinguished – Relating to zoning, planning, or land use – zoning and planning – Permits, certificates and approvals – Streets, improvements, and utilities

Conditions attached by city on its approval of intensified commercial use of property, of dedicating part of property for pedestrian and bicycle pathway and for greenway and storm water drainage purposes did not constitute a taking; there was direct and reasonable relationship between conditions and impacts and public needs to which use would give rise.

Judicial Review from Land Use Board of Appeals.

David B. Smith, Tigard, argued the cause and filed the brief for petitioners.

James M. Coleman, Portland, argued the cause for respondent. With him on the brief was O'Donnell, Ramis, Crew & Corrigan, Portland.

Before Richardson, Presiding Judge, and Deits and Durham, Judges.

RICHARDSON, P.J.

Affirmed.

CJS, Zoning and Land Planning § 197.

RICHARDSON, P.J.

Petitioners applied to the City of Tigard for a permit to tear down the existing retail building on their property, to construct a larger one and to intensify the commercial use of the property. The city granted the application, subject to the conditions specified in applicable zoning ordinance provisions that petitioners dedicate part of the property for a pedestrian and bicycle pathway and for greenway and storm water drainage purposes. Subsequently, petitioners sought a variance from the provisions prescribing the conditions, which the city denied. Petitioners appealed to LUBA, contending that the dedication requirements constitute uncompensated takings of the property in violation of Article I, section 18, of the Oregon Constitution and the Fifth Amendment to the federal constitution, made applicable to the city by the Fourteenth Amendment. LUBA rejected the contentions and affirmed the city's decision. Petitioners seek review, and we affirm.

1. In *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), the Supreme Court developed what appears to be a three-level inquiry for determining when a condition on development constitutes a taking. The first question is whether there is a legitimate governmental interest that the regulation that establishes the conditions is designed to serve. The second is whether the regulation and the condition "substantially advance" that interest. *See Agins v. Tiburon*, 447 US 255, 100 S Ct 2138, 65 L Ed 2d 106 (1980). In *Dept. of Trans. v. Lundberg*, 312 Or 568, 576-77, 825 P2d 641 (1992), the Oregon Supreme Court explained the second part of the *Nollan* inquiry:

"The Supreme Court of the United States held that this type of condition amounts to an unconstitutional taking unless there is an 'essential nexus' between the land use regulation that the permit condition is intended to implement and the permit condition. The Court described this requirement:

> " '[A] permit condition that serves the same legitimate [governmental] purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. * * *
>
> " 'The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. * * * In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion." '

"Nollan v. California Coastal Comm'n, supra, 483 US at 836-37 (citing authority). The Court concluded that the permit condition did not serve any of the purposes relied on to justify its imposition. The lack of nexus between the permit condition and the purpose of the building restriction converted that purpose to 'the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation[,]' *i.e.*, to an unconstitutional taking. *Id.* at 837." (Brackets in original.)

The third inquiry is concerned with the application of the conditions to particular developments and poses the question of what relationship must exist between the impacts or public needs that result from a development and the conditions that may be attached to its approval to ameliorate or respond to those impacts and needs. (In land use parlance, this is sometimes called the relationship between "impacts" and "exactions.") The Court said in *Nollan:*

> "The Commission claims * * * that we may sustain the condition at issue here by finding that *it is reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes. We can accept, for purposes of discussion, the Commission's proposed test* as to how close a 'fit' between the condition and the burden is required, because we find that this case [*sic*] does not meet even the most untailored standards." 483 US at 838. (Emphasis supplied.)

The Court proceeded to hold that requiring the Nollans to grant a public beach access easement did not have the necessary relationship to the construction of the house for which they sought a permit. Stripped to its essentials, the Court's reasoning is that the house would not interfere with access in the way that the Commission thought and, therefore, the easement could not be required to promote access, at least without payment of compensation to the Nollans.

Although petitioners' brief in this court differs significantly from the argument that they made to LUBA, the principal issues here, as there, are what the proper test is

for ascertaining whether a condition survives constitutional scrutiny under the third question in *Nollan* and whether the conditions here pass that test. The city argues, and LUBA concluded, that the "reasonable relationship" test is the correct one under both constitutions. LUBA explained the substance of that test:

> "The 'reasonable relationship' standard is somewhere between the more extreme standards followed by courts in a few jurisdictions which require that the need for a development exaction be 'specifically and uniquely attributable' to the proposed development, or that a development exaction merely have 'some relationship' to the proposed development. *Parks v. Watson*, [716 F2d 646 (9th Cir 1983)]."

Petitioners do not appear to dispute that that is the correct conclusion under the Oregon Constitution, and we agree with LUBA's conclusion and its analysis of the Article I, section 18, issue. *See Hayes v. City of Albany*, 7 Or App 277, 490 P2d 1018 (1971); *O'Keefe v. City of West Linn*, 14 Or LUBA 284 (1986). The reasonable relationship test has also been adopted as the correct standard under the Fifth Amendment by most courts that have addressed the question. It was endorsed by the Ninth Circuit in *Parks v. Watson, supra*, and that court in effect held in *Commercial Builders v. Sacramento*, 941 F2d 872 (9th Cir 1991), that *Nollan* did nothing to change or modify the applicable test. *See* note 1, *infra*.

Petitioners argue that *Commercial Builders* is incorrect and that *Nollan* demands a more stringent Fifth Amendment standard. They maintain that *Nollan* requires a "substantial relationship" or "essential nexus" between

developmental impacts and conditions if the conditions are not to constitute takings. It is unclear how petitioners think that the various tests might differ in practice. It is clear, however, that they misread *Nollan*. The language to which they trace the putatively heightened test appears in the Court's reiteration that the regulation must substantially advance the legitimate state interest that it is meant to serve and in its explanation that a condition that is substituted for a prohibition must further the end that justifies the prohibition. 483 US at 834, 837; *see Agins v. Tiburon, supra*. In other words, that language relates to the second of *Nollan's* questions, but the third question is the one presented here. The language in *Nollan* that is most in point, and is quoted above, assumes *arguendo* the correctness of the reasonable relationship standard for determining the permissibility of imposing conditions responsive to the impacts of particular developments. In the light of the Ninth Circuit's and LUBA's well-reasoned espousals of the reasonable relationship standard, and in the absence of anything approaching a rejection of it in *Nollan*, we conclude that it is the proper test under the Fifth Amendment as well as under Article I, section 18.[1]

2. The city stated in findings that petitioners do not challenge:

> "[T]he dedication and pathway construction are reasonably related to the applicant's request to

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[1] Aside from the test that petitioners argue was adopted in *Nollan*, and which we have held was not adopted there, the United States Supreme Court has not adopted the reasonable relationship test or any other, so far as we, LUBA or the parties know.

intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreation needs. * * * In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

"[T]he required [greenway and storm water drainage] dedication [is] reasonably related to the applicant's request to intensify the usage of this site, thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, * * * the requirement of dedication of the floodplain area on the site is related to the

applicant's plan to intensify development of the site."

LUBA concluded, and we agree, that those findings demonstrate a direct and reasonable relationship between the conditions that the city attached to its approval of the intensified use and the impacts and public needs to which the use will give rise. In addition to the fact that the conditions are part of a general and comprehensive regulatory scheme, the findings demonstrate that the increased water runoff from the intensified development will create conditions to which the greenway/storm water drainage requirement is responsive. Similarly, the pedestrian and bicycle pathway condition is reasonably calculated to alleviate the increased traffic problems and accommodate the increased need and demand for non-vehicular access to the area that will result from the intensified operations. The conditions satisfy the reasonable relationship standard. *See Dept. of Trans. v. Lundberg, supra.*

Petitioners also argue that the deprivation of their possession and use of the dedicated part of their property is a "*per se* taking" that violates both constitutions, even if it survives the constitutional standards for the imposition of conditions on development approvals. The argument is circular. If the standards articulated for the imposition of conditions in *Nollan* and other apposite authorities are satisfied, there is, *per se*, no unconstitutional taking, because the only way in which petitioners do or can assert that the city took their property was by imposing the conditions.

Petitioners attempt to extricate themselves from that truism by contending that the "invasion" of their property affects the parcel as a whole, even though the dedication requirement applies to far less than the whole. They also argue that the conditions deny them all economically viable use of their land. Both assertions are untenable.

Affirmed.

APPENDIX D

JOHN T. DOLAN and FLORENCE DOLAN,
Petitioners,

vs.

CITY OF TIGARD,
Respondent.

~~LUBA NO. 91-161~~

Appeal from City of Tigard.

Joseph R. Mendez, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Knappenberger & Mendez.

James M. Coleman, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was O'Donnell, Ramis, Crew & Corrigan.

David B. Smith, Tigard, filed a brief and argued on behalf of amicus Oregonians in Action.

SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON, Referee, participated in the decision.

AFFIRMED 02/07/92.

1. **Constitutional Law – Oregon Constitution – Non-procedural Issues.**

Article I, Section 18, of the Oregon Constitution requires that there be a "reasonable relationship" between a condition of approval and the impacts of or needs generated by the proposed development.

2. **Constitutional Law – U.S. Constitution – Non-procedural Issues.**

A condition requiring dedication of portions of the applicants' property is not an unconstitutional taking under the Fifth Amendment of the U.S. Constitution, if it

has a "reasonable relationship" to the impacts of the proposed development. *Nollan v. California Coastal Com'n*, 483 US 825, 107 S Ct 3141, 97 L Ed2d 677 (1987), does not establish a new, stricter standard for the relationship required between the impacts of a proposed development and exactions imposed as conditions of approval.

3. **Constitutional Law – Oregon Constitution – Non-procedural Issues.**

   Constitutional Law – U.S. Constitution – Non-procedural Issues.

Where a proposed larger building and paved parking area will increase the amount of impervious surfaces on the subject property and, therefore, runoff into an adjacent creek, there is a "reasonable relationship" between the proposed development and a condition requiring land along the creek to be dedicated for a planned greenway for management of storm water runoff.

4. **Constitutional Law – Oregon Constitution – Non-procedural Issues.**

   Constitutional Law – U.S. Constitution – Non-procedural Issues.

Where a significantly larger retail sales building and parking lot will accommodate larger numbers of customers and employees and their vehicles, there is a reasonable relationship between alleviating these impacts of the development and a condition requiring dedication of land for a pedestrian/bicycle pathway as an alternative means of transportation.

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a city council resolution granting site development review approval for construction of a retail sales building, but denying variances to Tigard Community Development Code (TCDC) provisions requiring dedication of land for a greenway and a pedestrian/bicycle pathway and prohibiting roof signs.[1]

FACTS

Petitioners appealed a previous city decision granting site development review approval for construction of the proposed retail sales building, and imposing conditions requiring greenway and pedestrian/bicycle pathway dedications and roof sign removal. In our opinion in that appeal, *Dolan v. City of Tigard*, 20 Or LUBA 411, 412 (1991) (*Dolan I*), we set out the following relevant facts:

> "Petitioners own a 1.67 acre parcel in downtown Tigard which is designated Central Business District on the Tigard Comprehensive Plan (plan) map and is zoned Central Business District – Action Area (CBD-AA). A 9,700 square foot retail sales building, occupied by an electric and plumbing supply business also owned by petitioners, is located on the eastern edge of the subject parcel. The structure includes a large roof sign, and is adjoined by a partially paved

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[1] The challenged decision also approves a variance to applicable TCDC parking requirements for general retail sale businesses, allowing provision of only 39, rather than 44, parking spaces. However, this portion of the decision is not at issue in this appeal.

parking lot. Fanno Creek flows through the southwestern corner of the subject parcel and along its western boundary.

"Petitioners applied to the city for site development review approval to replace the existing building with a 17,600 square foot retail sales building constructed on the western portion of the subject parcel.† * * * "

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†"Petitioners proposed to demolish the existing 9,700 square foot building after the new building was completed and the electric and plumbing supply business moved into it."

In *Dolan I*, we affirmed the challenged city decision. Specifically, we held petitioners' claims that the conditions of approval requiring dedication of portions of their property for a greenway and a pedestrian/bicycle pathway constituted an unconstitutional "taking" under both the United States and Oregon Constitutions were not "ripe" for review, because petitioners had not sought relief through the variance process provided by TCDC Chapter 18.134. *Id.*, 20 Or LUBA at 425-26. We also rejected petitioners' claim that the condition requiring removal of the existing roof sign within 45 days of the issuance of an occupancy permit for the new building was unreasonable and a "denial of due process," because petitioners did not support this constitutional claim with legal argument. *Id.*, 20 Or LUBA at 426.

On March 28, 1991, petitioners submitted a new site development review application for the proposed retail sales building to the city, including requests for variances

from TCDC 18.120.180.A.8,[2] 18.86.040.A.1.b[3] and 18.114.070.H.[4] On September 17, 1991, the city council

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[2] TCDC 18.120.180.A.8 establishes the following standard for site development review approval:

"Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan."

[3] TCDC 18.86.040.A.1 provides in relevant part:

"The City may attach conditions to any development within an action area prior to adoption of the design plan to achieve the following objectives:

"* * * * *

"b. The development shall facilitate pedestrian/bicycle circulation if the site is located * * * adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:

"(i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. * * *

"* * * * *"

[4] TCDC 18.114.070.H prohibits "roof signs of any kind." There is confusion in the record as to whether petitioners really sought a variance to this provision, or rather sought to convince the city that the sign in question is not actually a "roof sign." *See* Record 9, 27, 160.

adopted the challenged resolution approving site development review, but denying the requested variances. The city's decision includes the following relevant conditions:

> "1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (*i.e.* all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area. * * * "[5] Record 31-32.
>
> "15. The existing roof sign shall be permanently removed from the subject property within 45 days of the issuance of the Occupancy Permit for the new building."[6] Record 34.

FIRST ASSIGNMENT OF ERROR

> "The City's decision to demand the dedication to the City of those portions of Petitioners' land lying 15 feet to the east of the 100-year flood plain boundary constitutes an unlawful taking in violation of Petitioners' rights under the Oregon and United States Constitutions."

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[5] The dedications required by this condition comprise approximately 7,000 square feet, or 10% of the subject parcel. Record 159.

[6] Conditions 1 and 15 are virtually identical to conditions included in the site design review approval decision challenged in *Dolan I*. *See Dolan I*, 20 Or LUBA at 413.

SECOND ASSIGNMENT OF ERROR

> "The City Council's exaction of all portions of Petitioners' property falling within the 100-year flood plain constitutes an unlawful taking of private property for public use, in violation of the Oregon and United States Constitutions."[7]

A. Introduction

In the first and second assignments of error, petitioners challenge the validity of the condition imposed by the city requiring petitioners to dedicate to the city the portions of the subject parcel within the 100-year flood plain of Fanno Creek and within 15 feet to the east of the flood plain boundary. Petitioners argue that this condition of site development review approval constitutes a taking, without just compensation, of the 7,000 square feet of their parcel required to be dedicated for public use, in violation of the Fifth Amendment to the United States Constitution and Article I, Section 18 of the Oregon Constitution. Petitioners ask that we either reverse the city's imposition of this condition or remand the decision to the city with instructions to remove the condition.

Petitioners do not contend that establishing a greenway in the floodplain of Fanno Creek for

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[7] The brief of amicus Oregonians in Action includes an assignment of error which states essentially the same allegations as petitioners' first and second assignments of error. The purpose of amicus participation is to aid this Board in its review of relevant issues. OAR 661-10-052(1). We consider amicus' arguments to the extent they are relevant to the issues raised by petitioners' assignments of error.

storm water management purposes, and providing a pedestrian/bicycle pathway system as an alternative means of transportation, are not legitimate public purposes. Further, petitioners do not challenge the sufficiency of the "nexus" between these *legitimate public purposes* and the *condition* imposed requiring dedication of portions of petitioners' property for the greenway and pedestrian/bicycle pathway. Rather, petitioners' contention is that under both the federal and Oregon Constitutions, the relationships between the *impacts* of the proposed development and the *exactions* imposed are insufficient to justify requiring dedication of petitioners' property without compensation.

The challenged decision includes the following findings addressing the impacts of the proposed development and the relationship between the impacts of the proposed development, and the required dedication of land for greenway and pedestrian/bicycle pathway purposes:

"The * * * requirements for dedication of the area adjacent to the floodplain for greenway purposes and for construction of a pedestrian/bicycle pathway [do not] constitute a taking of the applicant's property. [T]he dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and

recreation needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." Record 20.

"The * * * requirements for dedication of the area within the floodplain of Fanno Creek for storm water management and greenway purposes [do not constitute] a taking of the applicant's property. [T]he required dedication [is] reasonably related to the applicant's request to intensify the usage of this site, thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage

> would add to the need for public management of the Fanno Creek floodplain, * * * the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." Record 28.

Petitioners generally argue under these assignments of error that the proposed development is "in no way related to" or "not related to" the challenged dedication requirement. Petition for Review 11, 14. However, petitioners do not challenge the adequacy of the above quoted findings or their evidentiary support in the record. Therefore, for purposes of evaluating petitioners' constitutional taking claims, we assume that the facts found by the city concerning the impacts of the proposed development and the need for storm water management and alternative means of transportation are valid, and consider only whether these facts are legally sufficient to establish the requisite relationship between the impacts of the proposed development and the exaction imposed.

B. Oregon Taking Claim

Article 1, Section 18 of the Oregon Constitution provides in relevant part:

> "Private property shall not be taken for public use * * * without just compensation * * * ."

Petitioners contend the Oregon Supreme Court has never articulated a standard for applying Article I, Section 18 of the Oregon Constitution to conditions of development approval which constitute a physical taking, such as a condition requiring dedication of land. Petitioners argue, however, that we should apply the "reasonable

relationship" standard previously used by the Court of Appeals and this Board in other contexts to determine the validity of development exactions. *Hayes v. City of Albany*, 7 Or App 277, 285, 490 P2d 1018 (1971); *O'Keefe v. City of West Linn*, 14 Or LUBA 284, 293 (1986). Petitioners contend there is no "reasonable relationship" between the disputed condition requiring dedication of a portion of their property for a greenway and a pedestrian/bicycle pathway and the impacts of the proposed development.

1 We agree with petitioners that Article I, Section 18, of the Oregon Constitution requires that there be a "reasonable relationship" between the challenged condition and the impacts of or needs generated by the proposed development. For the reasons stated in the following subsection of this opinion, we find such a "reasonable relationship" exists.

This subassignment of error is denied.

C. Federal Taking Claim

The Fifth Amendment to the United States Constitution, made applicable to states and local governments through the Due Process Clause of the Fourteenth Amendment, provides in relevant part:

> "[N]or shall private property be taken for public use, without just compensation."

Both petitioners' and amicus' arguments rely heavily on the opinion of the United States Supreme Court in *Nollan v. California Coastal Com'n*, 483 US 825, 107 S Ct 3141, 97 L Ed2d 677 (1987) (*Nollan*). Prior to *Nollan*, it had been established by most court, including the federal

courts of this circuit, that a development exaction must have a "reasonable relationship" to the impacts of, or needs created by, the proposed development.[8] *See e.g., Parks v. Watson*, 716 F2d 646, 653 (9th Cir 1983). Petitioners and amicus argue that under *Nollan*, something more than a "reasonable relationship" between the impacts of the proposed development and the required exaction is necessary to avoid an unconstitutional taking. Petitioners and amicus variously describe the closer relationship required as a "clear match," and "essential nexus" or a "substantial relationship." Petition for Review 11; Amicus Brief 9, 11. Petitioners and amicus further argue that the dedication required by the challenged condition is clearly intended to secure benefits for the general public and is not even reasonably related to any hypothetical impacts on storm water drainage and traffic due to the proposed development.

Respondent contends *Nollan* does not require that there be a closer relationship between the *impacts* of a proposed development and the extent of exactions imposed. According to respondent, the closer relationship required by *Nollan* is that there be an "essential nexus" between the *legitimate public purpose* pursued and the

[8] The "reasonable relationship" standard is somewhere between the more extreme standards followed by courts in a few jurisdictions which require that the need for a development exaction be "specifically and uniquely attributable" to the proposed development, or that a development exaction merely have "some relationship" to the proposed development. *Parks v. Watson, supra.*

nature of the exaction imposed as a condition of development approval. Respondent also argues that in *Commercial Builders v. Sacramento*, 941 F2d 872 (9th Cir 1991), the court considered the impact of *Nollan* with regard to this issue and stated:

> " * * * *Nollan* does not stand for the proposition that an exaction * * * will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, *Nollan* holds that where there is *no* evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld. * * * " (Emphasis added.) *Commercial Builders v. Sacramento, supra*, 941 F2d at 875.

Respondent contends all that is required is a "reasonable relationship" between the impacts of the proposed development and the exaction imposed by the challenged condition. With regard to the required dedication of land within the floodplain of Fanno Creek for a greenway, respondent argues that the city's adopted Master Drainage Plan indicates the Fanno Creek greenway is an essential part of the city's program for storm water management. Respondent further argues the city's undisputed findings establish that the proposed development, which includes a larger building and paved parking lot, will increase the amount of impervious surface on the site and, therefore, will increase storm water runoff from the site. According to respondent, this is sufficient to establish a "reasonable relationship" between the proposed development and the dedication required.

property is not an unconstitutional taking if it has a "reasonable relationship" to the impacts of or needs generated by the proposed development. To the extent petitioners suggest the city is required to establish a numerical relationship between the increase in runoff due to the proposed development and the amount of land dedicated for the greenway, or that the land dedicated for the greenway will not also accommodate increased upstream discharges, we disagree. In view of the comprehensive Master Drainage Plan adopted by respondent providing for use of the Fanno Creek greenway in management of storm water runoff, and the undisputed fact that the proposed larger building and paved parking area on the subject property will increase the amount of impervious surfaces and, therefore, runoff into Fanno Creek, we conclude there is a "reasonable relationship" between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway.

4 Furthermore, the city has adopted a Comprehensive Pedestrian/Bicycle Pathway Plan which provides for a continuous network of pedestrian/bicycle pathways as part of the city's plans for an adequate transportation system. The proposed pedestrian/bicycle pathway segment along the Fanno Creek greenway on the subject property is a link in that network. Petitioners propose to construct a significantly larger retail sales building and parking lot, which will accommodate larger numbers of customers and employees and their vehicles. There is a reasonable relationship between alleviating these impacts of the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation.

We, therefore, conclude the challenged condition requiring dedication of portions of petitioners' property is not an unconstitutional taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

This subassignment of error is denied.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

> "The City has characterized an existing wall sign as a 'roof sign.' By mischaracterizing the sign, the City then establishes a requirement that the sign be removed within 45 days of occupancy of the new building which is unreasonable and hence a denial of due process."

Petitioners argue the "roof sign" on the existing building which is required to be removed by condition 15 is actually "part of a parapet wall constructed on the existing building in order to join three small buildings into one structure and hide unsightly roof liens." Petition for Review 16, Petitioners also argue that the sign in question is an integral part of the existing building, and that it is unreasonable for the city to require them to remove it within 45 days of obtaining an occupancy permit for the new building.

Whether the sign in question is correctly characterized as a "roof sign" is of no importance to resolution of this assignment of error. Petitioners do not contend the challenged condition would be impermissible if the sign were other than a "roof sign." Rather, petitioners contend the condition is impermissible because the amount of

time allowed for them to remove the sign is "unreasonable and hence a denial of due process."

In response to the same argument by petitioners in *Dolan I*, we stated:

> "* * * Petitioners presumably intend this phrase to indicate that the city's decision is unconstitutional in some way and, therefore, subject to reversal or remand under ORS 197.835(7)(a)(E). However, no argument supporting an allegation of unconstitutionality is provided in the petition for review. This Board has consistently declined to consider claims of constitutional violations where, as here, they are unsupported by legal argument. *Van Sant v. Yamhill County*, 17 Or LUBA 563, 566-67 (1989); *Faulkender v. Hood River County*, 17 Or LUBA 360, 366 (1989); *Portland Oil Service Co. v. City of Beaverton*, 16 Or LUBA 255, 269 (1987); *Chemeketa Industries Corp. v. City of Salem*, 14 Or LUBA 159, 165-66 (1985)." *Dolan I*, 20 Or LUBA at 426-27.

Petitioners still do not provide any legal argument in support of their allegation of unconstitutionality with regard to the time limit for removal of the "roof sign."

The third assignment of error is denied.

The city's decision is affirmed.

APPENDIX E

JOHN T. DOLAN and FLORENCE DOLAN,
Petitioners,

vs.

CITY OF TIGARD,
Respondent.

LUBA No. 90-029

Appeal from City of Tigard.

Joseph R. Mendez and Kathryn H. Clarke, Portland, filed the petition for review and a reply brief. With them on the brief was Knappendberger & Mendez. Joseph R. Mendez argued on behalf of petitioners.

Phillip E. Grillo, Portland, filed the response brief. With him on the brief was O'Donnell, Ramis, Elliott & Crew. James M. Coleman, Lake Oswego, argued on behalf of respondent.

SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED 01/24/91

1. LUBA Procedures/Rules – Briefs – Reply.

Argument in respondent's brief that the remedy petitioners seek is unclear, or that petitioners failed to object to statutes, and citation in respondent's brief of cases which petitioners believe irrelevant are not new matters which warrant the filing of a reply brief, but rather are matters to which petitioners can adequately respond at oral argument.

2. **LUBA Procedures/Rules – Petition for Review.**

LUBA Scope of Review – Generally.

No statutory or rule provisions require a petition for review to conform with requirements for pleadings in circuit court proceedings. If a petition for review does not set out facts and legal argument sufficient to persuade LUBA that there is a basis for reversal or remand of the challenged decision, LUBA simply affirms the decision.

3. **Constitutional Law – U.S. Constitution – Non-procedural Issues.**

A federal taking claim challenging a condition of development approval is not ripe for review if a variance process in the local code is an available administrative means for petitioners to seek relief from the disputed condition.

4. **Constitutional Law – Oregon Constitution – Non-procedural Issues.**

Petitioners' challenge to a condition of development approval as a taking, contrary to the Oregon Constitution, cannot be upheld if a variance process in the local code is an available administrative means for petitioners to seek relief from the disputed condition.

5. **Constitutional Law – Nonspecific Constitutional Claims.**

LUBA will not consider claims of constitutional violations which are unsupported by legal argument.

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a Tigard City Council resolution granting, with conditions, site development review approval and a variance allowing construction of a new retail sales building and parking lot to replace a smaller existing facility.

FACTS

Petitioners own a 1.67 acre parcel in downtown Tigard which is designated Central Business District on the Tigard Comprehensive Plan (plan) map and is zoned Central Business District – Action Area (CBD-AA). A 9,700 square foot retail sales building, occupied by an electric and plumbing supply business also owned by petitioners, is located on the eastern edge of the subject parcel. The structure includes a large roof sign, and is adjoined by a partially paved parking lot. Fanno Creek flows through the southwestern corner of the subject parcel and along its western boundary.

Petitioners applied to the city for site development review approval to replace the existing building with a 17,600 square foot retail sales building constructed on the western portion of the subject parcel.[1] Petitioners also requested a variance to applicable Tigard Community Development Code (TCDC) parking requirements for

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[1] Petitioners proposed to demolish the existing 9,700 square foot building after the new building was completed and the electric and plumbing supply business moved into it.

general retail sale businesses, to allow provision of only 39, rather than 44, parking spaces.

The city planning director approved petitioners' site development review and variance application, imposing 14 conditions. The conditions included the following:

> "[Prior to the issuance of building permits t]he applicant shall dedicate to the City as greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (*i.e.* all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. * * * The building shall be designed so as not to intrude into the greenway area."[2] Record 238.
>
> "[Prior to issuance of an occupancy permit t]he existing roof sign shall be permanently removed from the subject property." Record 239.

Petitioners appealed the planning director's decision to the planning commission, challenging five of the conditions imposed by the planning director, including the two quoted above.

After a public hearing, the planning commission approved petitioners' application with 12 conditions, including the first one quoted above. However, the planning commission modified the condition requiring removal of the roof sign on the existing building to provide that it "shall be removed within 45 days of the issuance of the Occupancy Permit for the new building."

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[2] The dedications required by this condition would comprise approximately 7,000 square feet, or 10% of the subject parcel. Record 26.

Record 132. Petitioners appealed the planning commission's decision to the city council, challenging five of the conditions imposed, including the two quoted above.

After a further public hearing, the city council adopted a resolution denying the appeal and upholding the planning commission's decision.[3] This appeal followed.

MOTION TO FILE REPLY BRIEF

Pursuant to OAR 661-10-039,[4] petitioners request permission to file a reply brief addressing the following issues, which petitioners contend were raised for the first time in respondent's brief:

> "1) Petitioners have failed to exhaust administrative remedies;
>
> "2) Petitioners have failed to state a claim;
>
> "3) Petitioners are required to challenge the City's comprehensive plan and development code;
>
> "4) The remedy Petitioners seek is unclear;

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[3] The city council made a minor modification to one condition imposed by the planning commission which is not at issue in this appeal. The city council also adopted as its own the planning commission's findings of fact, analysis and conclusions. Record 28.

[4] OAR 661-10-039 provides:
"A reply brief may not be filed unless permission is first obtained from the Board. A reply brief shall be confined solely to new matters raised in the respondent's brief. * * * "

"5) Petitioners are required to object to statutes; and

"6) State and federal cases have been cited by Respondent which are not relevant and can be distinguished by Petitioners." Petitioners' Motion for Permission to File a Reply Brief 1.

Respondent objects to petitioners' motion and argues that points one through five above are not "new matters" raised for the first time in respondent's brief. Respondent argues that points one through four are simply arguments that petitioners failed to establish that all of the critical elements of a "takings" claim are satisfied. Respondent contends that point five above merely points out a weakness in petitioners' arguments in the petition for review. With regard to point six, respondent argues it is not necessary for petitioners to file a reply brief to distinguish cases cited by respondent, as that can be accomplished at oral argument.

We have interpreted OAR 661-10-039 "to require petitioners to demonstrate a need for a reply brief." *Knapp v. City of Jacksonville*, 20 Or LUBA 189, 194 (1990); *Kellogg Lake Friends v. Clackamas County*, 17 Or LUBA 277, 281 (1988), *aff'd* 96 Or App 536, *rev den* 308 Or 197 (1989). We agree with petitioners that respondent's claim that petitioners failed to exhaust administrative remedies (point one above) was raised for the first time in respondent's brief, and warrants the filing of a reply brief.

1 However, with regard to points two and three above, these points were raised not only in respondent's brief, but also in respondent's Motion to Dismiss for Failure to State a Claim, filed the same day as respondent's brief.

Petitioners addressed these points in their Memorandum in Response to Motion to Dismiss for Failure to State a Claim. Petitioners do not need an *additional* opportunity to respond to these points in a reply brief. Finally, points four through six above are not really new matters, but rather the type of argument in a response brief to which petitioners can adequately respond at oral argument.

Accordingly, petitioners' motion to file a reply brief is granted with regard to the issue of whether petitioners failed to exhaust administrative remedies, and is otherwise denied.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Respondent moves for issuance of an order dismissing this appeal on the grounds that petitioner has failed to state a claim upon which relief can be granted. Respondent argues that under their first and second assignments of error, petitioners allege that the appealed decision is an unconstitutional "taking" of private property for public use without just compensation, in violation of the Fifth Amendment of the U.S. Constitution and Article 1, Section 18 of the Oregon Constitution. Respondent contends that petitioners fail to allege in their petition for review facts which, under state and federal law, are required elements of a takings claim.[5]

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[5] For instance, respondent complains that the petition for review fails to allege that the city's decision "destroys a major portion of the property's value" and "depriv[es the owners] of the property's economically valuable use," and fails to set out facts establishing the value of the property, the value of the

Petitioners maintain that a petition for review in a LUBA appeal is not a pleading like a complaint in a circuit court proceeding. Petitioners argue that no statute or administrative rule requires a petition for review to contain allegations of ultimate facts sufficient to constitute a claim for relief.

2 ORS 197.830(11) requires a petition for review to include:

> "(a) The facts that establish that the petitioner has standing;
>
> "(b) The date of the [appealed] decision;
>
> "(c) The issues the petitioner seeks to have reviewed."

ORS 197.835(1) requires LUBA to review the issues raised in a petition for review and issue a final order affirming, reversing or remanding the challenged land use decision. ORS 197.350(1) provides that a party appealing a land use decision to LUBA has the burden of persuasion. We agree with petitioners that there are no statutory or rule provisions which require a petition for review to conform with requirements for pleadings in circuit court proceedings. If a petition for review does not set out facts and legal argument sufficient to persuade us that there is a basis for reversal or remand of the challenged decision, we simply affirm the decision.

The motion to dismiss for failure to state a claim is denied.

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business or the effects of the disputed condition on either. Memorandum in Support of Motion to Dismiss for Failure to State a Claim 2-3.

FIRST ASSIGNMENT OF ERROR

> "The City's decision to demand the dedication to the City of those portions of Petitioners' land lying 15 feet to the east of the 100-year flood-plain boundary constitutes an unlawful taking in violation of Petitioners' rights under the Oregon and United States Constitutions."

SECOND ASSIGNMENT OF ERROR

> "The city council's exaction of all portions of Petitioners' property falling within the 100 year flood plain constitutes an unlawful taking of private property for public use, in violation of the Oregon and United States Constitutions."

A. Introduction

In the first and second assignments of error, petitioners challenge the validity of the condition imposed by the city requiring petitioners to dedicate to the city the portions of the subject parcel within the 100-year flood plain of Fanno Creek and within 15 feet to the east of the flood plain boundary. Petitioners argue that this condition of site development review approval constitutes a taking, without just compensation, of the 7,000 square feet of their parcel required to be dedicated for public use, in violation of the Fifth Amendment to the U.S. Constitution and Article I, Section 18 of the Oregon Constitution. Fairly read, the petition for review asks that we either reverse the city's imposition of this condition or remand the decision to the city with instructions to remove the invalid condition.

The Fifth Amendment to the U.S. Constitution, made applicable to states and local governments through the Due Process Clause of the Fourteenth Amendment, provides in relevant part:

> "[N]or shall private property be taken for public use, without just compensation."

Article 1, Section 18 of the Oregon Constitution provides in relevant part:

> "Private property shall not be taken for public use * * * without just compensation * * * ."

Petitioners base their federal taking claim on the argument that because the condition requires petitioners to permit physical occupation of the dedicated portion of their property, it constitutes a taking, regardless of the extent of the economic impacts on petitioners' use of their property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 435-436, 102 S Ct 3164, 73 L Ed2d 868 (1982). Petitioners contend that requiring such a taking without compensation, as a condition of development approval, is constitutional only if there is a sufficient nexus between the condition and the impacts of the proposed development. *Nollan v. California Coastal Comm'n*, 483 US 825, 837, 107 S Ct 3141, 97 L Ed2d 677 (1987). The question presented in *Nollan* concerned a condition of approval for replacement of a dwelling with a larger structure. The condition of approval, which required an easement allowing public passage along the subject property between a seawall and the high tide line, was held to be unconstitutional because the condition lacked an essential nexus with the coastal commission's legitimate state interests, e.g., in protecting the public's ability to *see* the beach.

Petitioners contend that such a nexus is lacking in this case.

With regard to petitioners' state taking claim, petitioners contend that the Oregon Supreme Court has never articulated a standard for applying Article I, Section 18 of the Oregon Constitution to conditions of development approval which constitute a physical taking (e.g., dedication of easement). Petitioners argue, however, that we should apply the "reasonable relationship" standard previously used by the Court of Appeals and this Board in other contexts to determine the validity of development exactions. *Hayes v. City of Albany*, 7 Or App 277, 285, 490 P2d 1018 (1971); *O'Keefe v. City of West Linn*, 14 Or LUBA 284, 293 (1986). Petitioners contend there is no "reasonable relationship" between the disputed condition requiring dedication of their property for a greenway and bike path and the impacts of the proposed development.

B. Ripeness

Respondent contends that petitioners' constitutional claims are premature because petitioners failed to exhaust their administrative remedies. Respondent argues that under *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 581 P2d 50 (1978) (exhaustion doctrine requires plaintiff to seek quasi-judicial plan and zoning map amendments before claiming that plan and zoning provisions are unconstitutional as applied to plaintiff's property), whether petitioners exhausted their administrative remedies depends on the answers to three separate questions:

"1. Were the nonjudicial remedies [to be] pursued by the plaintiff truly 'administrative' or were they legislative in nature?

"2. If 'administrative,' were these potential remedies truly available to the plaintiff at the time it filed suit?

"3. If available, were they adequate to address plaintiff's desire to use the subject property as plaintiff wished?" Respondent's Brief 5.

According to respondent, petitioners' constitutional claims are premature because petitioners failed to seek a variance, pursuant to TCDC Chapter 18.134, from the provisions of the TCDC requiring dedication of petitioners' property for greenway and bike path purposes. Respondent argues that the variance process established in TCDC Chapter 18.134 satisfies the three-part *Fifth Avenue Corp.* test for availability of an administrative remedy because a variance under TCDC Chapter 18.134 (1) is an administrative/quasi-judicial remedy, rather than a legislative one; (2) was available to petitioners when their application was filed, and remains available; and (3) if granted, could completely relieve petitioners from the disputed condition requiring dedication of a portion of their property.[6]

[6] Respondent also points out that pursuant to CDC Chapter 18.134, petitioners applied for a variance from certain CDC off-street parking requirements, and the appealed decision includes approval of that variance request.

Petitioners contend they complied with the exhaustion requirement of ORS 197.825(2)(a).[7] Petitioners argue that because they appealed the planning director's decision on their application to the planning commission, and the planning commission's decision to the city council, every city decision maker acted on their application. According to petitioners, having pursued their application to the highest level city decision maker, they are not required to go back to the planning director and request a variance pursuant to TCDC Chapter 18.134. Petitioners rely on *Portland Audubon Society v. Clackamas Co.*, 77 Or App 277, 280-81, 712 P2d 839(1986), which states that ORS 197.825(2)(a) is satisfied if a petitioner has gone to the highest local decision-maker once. Petitioners also cite *Colwell v. Washington County*, 79 Or App 82, 91, 718 P2d 747, *rev den* 301 Or 338 (1986), which states that ORS 197.825(2)(a) does not require pursuit of local remedies that are unlikely to serve any purpose except redundancy.

Petitioners contend that *Fifth Avenue Corp., supra,* is inapplicable here because in that case the Oregon Supreme Court applied the exhaustion of administrative remedies requirement to a claim that certain plan and code provisions were unconstitutional *"as applied to the subject property* in that they were 'arbitrary, capricious [and] unreasonable.' " (Emphasis in original.) *Fifth Avenue Corp.*, 282 Or at 594. According to petitioners, the Court would not impose such an exhaustion requirement

[7] ORS 197.825(2)(a) provides that this Board's jurisdiction:
"Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review."

in this case, because petitioners' contentions are "directed to the validity of county [sic] acts without reference to the specific attributes of the subject property." Petitioners' Reply Brief 4.

Petitioners also contend that a variance pursuant to TCDC Chapter 18.134 was not an available or adequate remedy. TCDC 18.134.010 provides that a variance may be granted where "the literal interpretation of the provisions of *the applicable zone* would cause an undue or unnecessary hardship." (Emphasis added by petitioners.) Petitioners argue that they do not seek relief from any provision of the applicable CBD-AA *zoning district*. Petitioners further argue that no provision of the TCDC mandates that the city require dedication of their property as a condition for approval of development authorized by the plan and TCDC. Petitioners maintain that they do not contend any TCDC provision is unreasonable as applied to their property and, therefore, seeking a variance would not have addressed the issue raised in this appeal.

We agree with petitioners that this appeal of the city council's decision satisfies the exhaustion requirement of ORS 197.825(2)(a), in that petitioners appeal a decision on their application made by the highest possible level of local decision maker. Further, as provided by ORS 197.015(10)(a)(A) and (B) and OAR 661-10-010, that decision became "final" when the decision was reduced to writing and signed by the decision maker. Accordingly, we have *jurisdiction* to review the appealed decision.[8]

---

[8] We note that in this appeal petitioners make *only* constitutional challenges to the city's decision.

However, we understand respondent to contend that petitioners' state and federal constitutional taking claims are not *ripe* for resolution because, unless petitioners attempt to obtain administrative relief through a variance pursuant to TCDC Chapter 18.134, petitioners have not obtained a final determination as to *how* the city will apply the TCDC provisions which mandate application of the disputed condition to their property. As we understand it, respondent contends that the requirement that a taking claim be "ripe," as that concept has been explained in decisions of the federal and state appellate courts, requires that a petitioner seek local administrative remedies, such as variances, even though this Board has not in the past imposed a jurisdictional requirement that such remedies first be sought under the exhaustion requirement of ORS 197.825(2)(a) or the requirement of ORS 197.015(10)(a)(A) and (B) that the challenged land use decision be a final decision.

1. Federal Taking Claim

The United States Supreme Court has held that in order for a federal taking claim to be ripe for review, the property owner must obtain the local government's final determination as to how local regulations will be applied to his property. *Agins v. Tiburon*, 447 US 255, 100 S Ct 2138, 65 L Ed2d 106 (1980). In *MacDonald, Sommer & Frates v. Yolo County*, 477 US 340, 348, 106 S Ct 2561, 91 L Ed2d 285 (1986), the Supreme Court stated that ripeness is a requirement for judicial review of taking claims because a court "cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation

goes."[9] Furthermore the United States Supreme Court and other federal courts have held that taking claims are not ripe for review where property owners have failed to seek *variances* from applicable regulations which could have allowed them to develop their property as they wished. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 US 172, 189, 105 S Ct 3108, 87 L Ed2d 126 (1985) (*Hamilton Bank*); *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 US 264, 101 S Ct 2352, 69 L Ed2d 1 (1981) (*Hodel*); *Lai v. City and County of Honululu*, 841 F2d 301, 303 (9th Cir. 1988); *Kinzli v. City of Santa Cruz*, 818 F2d 1449, 1453-1454, *amended* 830 F2d 968 (9th Cir. 1987), *cert den* 484 US 1043, 108 S Ct 775, 98 L Ed2d 861 (1988).

In *Hamilton Bank, supra*, 473 US at 187, the United States Supreme Court quoted with approval the following passage from *Hodel* explaining why a taking challenge to a statute is not ripe where the property owners failed to seek administrative relief through variance and waiver procedures provided by that statute:

> " * * * If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties,

[9] We note that the requirement that a taking claim be ripe for review has been applied by the Court not only where property owners seek money damages for an alleged taking, but also where property owners seek only declarative and injunctive relief from a local regulation. *Pennell v. City of San Jose*, 485 US 1, 108 S Ct 849, 99 L Ed2d 1 (1988) (action for declaratory and injunctive relief against city, attacking constitutionality of city rent control ordinance).

> thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue * * * simply is not ripe for judicial resolution." *Hodel*, 452 US at 297.

Also in *Hamilton Bank, supra*, 473 US at 190, the Court explained that its unwillingness to review taking claims until property owners obtain a final decision with regard to how they will be allowed to develop their property is "compelled by the very nature of the inquiry required by the Just Compensation Clause." In *Hamilton Bank*, where property owners sought compensation for a regulatory taking, the inquiry required by the Just Compensation Clause concerned primarily the economic impacts of local regulations on the property owners' use of their property. The Court stated that such impacts "cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.*

The reasons for requiring that property owners seek administrative relief through an available variance process for a federal taking claim to be ripe for review, as expressed by the United States Supreme Court in *Hamilton Bank*, apply in this case as well. If a variance process were available under the TCDC which might relieve petitioners of all or part of the disputed condition, a mutually acceptable resolution with regard to petitioners' property might be reached. Furthermore, in this case petitioners' federal taking claim requires analysis of the nexus between the condition imposed, the purpose of the local regulations pursuant to which the condition is imposed and the impacts of the proposed development. Although

the nature of this *"Nollan"* inquiry differs from that required in *Hamilton Bank*, performing such a *Nollan* analysis also requires that the local government have "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[10] *Hamilton Bank*, 473 US at 190.

3 We, therefore, conclude that petitioners' federal taking claim is not ripe for review *if* the variance process of TCDC Chapter 18.134 is an available administrative means for petitioners to seek relief from the disputed condition (see sub-section 3 *infra*).

2. State Taking Claim

The Oregon Supreme Court has also interpreted Article I, Section 18 of the Oregon Constitution to require property owners to use available administrative procedures for development of their property before pursuing a state taking claim, stating that "if a means of relief from the alleged confiscatory restraint remains available, the property has not been taken."[11] *Suess Builders v. City of Beaverton*, 294 Or 254, 262, 656 P2d 306 (1982). Also in *Suess Builders*, the Court cited with approval discussion in *Fifth Avenue Corp.*, 282 Or at 614-21, requiring property

[10] The issue of ripeness was not raised in *Nollan*.

[11] Unlike the United States Supreme Court, which has described the ripeness requirement in terms of obtaining a "final determination" as to how regulations are applied, the Oregon Supreme Court has described what is essentially the same requirement in terms of "exhaustion of administrative remedies."

owners to seek quasi-judicial plan and zone map amendments before pursuing a claim that local regulations were unconstitutional as applied to their property. Finally, in *Dunn v. City of Redmond*, 86 Or App 267, 270, 739 P2d 55 (1987), the Court of Appeals rejected a property owner's taking claim where the property owner had failed to seek conditional use permits potentially available under local regulations.

4 While the Oregon Courts have not specifically addressed whether property owners must pursue a potentially available *variance* before pursuing a state taking claim, a variance is a type of administrative relief, and we see no significant difference between pursuing a variance and pursuing a plan or zone map amendment or a conditional use permit. We, therefore, conclude that petitioners' state taking claim cannot be upheld *if* the variance process of TCDC Chapter 18.134 is an available administrative means for petitioners to seek relief from the disputed condition (see subsection 3 *infra*).

3. Availability of Relief under TCDC Ch 18.134

The disputed condition of approval provides:

> "The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain (*i.e.* all portions of the property below elevation 150.0) and all property within 15 feet above (to the east of) the

150.0 foot floodplain boundary. * * * "[12] Record 38.

In the absence of an adopted design plan, the TCDC Action Area overlay zone imposes the following requirement on the approval of new development:

> "The development shall facilitate pedestrian/bicycle circulation if the site is located * * * adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:
>
> "(i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments *by requiring dedication and construction of pedestrian and bikepaths* identified in the comprehensive plan. * * *
>
> "* * * * * *" (Emphasis added.) TCDC 18.86.040.A.1.b.

Additionally, the TCDC site development review approval standards include the following:

> "Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City *shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain*. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." (Emphasis added.) TCDC 18.120.180.A.8.

[12] The city's finding further indicate that the purpose of requiring dedication of property to the east of the existing flood plain boundary is to accommodate storm drainage improvements planned for in the city's Master Drainage Plan and the bike path shown on the city's Master Plan for Fanno Creek Park. Record 38.

Finally, the city's Master Plan for Fanno Creek Park, which has been adopted as part of the city's comprehensive plan, depicts a portion of petitioners' property adjoining Fanno Creek as greenway and shows the existence of a bike path on this portion of petitioners' property. Parks Master Plans, fig. 2.

Petitioners do not dispute the applicability of the above quoted TCDC provisions to the proposed development. It is clear that the disputed condition requiring dedication of a portion of petitioners' property was adopted pursuant to these TCDC provisions. Therefore, if the variance process of TCDC Chapter 18.134 is an available administrative means of obtaining relief from the above quoted provisions, petitioners are required to seek that relief before pursuing either a federal or state taking claim.

The purpose section of TCDC Chapter 18.134 states:

> "The purpose of this chapter is to provide standards for the granting of variances *from the applicable zoning requirements of this title* where it can be shown that, owing to special and unusual circumstances related to a specific piece of the land, the *literal interpretation of the provisions of the applicable zone* would cause an undue or unnecessary hardship, except that no use variances shall be granted." (Emphasis added.) TCDC 18.134.010.

We do not agree with petitioners' argument that the city's use of the phrase "literal interpretation of the provisions of the applicable zone," emphasized above, is a sufficient basis for concluding that the variance process of TCDC Chapter 18.134 is applicable only to provisions of the TCDC's *zoning districts*, and not to provisions in the TCDC's Site Development Review Chapter, such as TCDC 18.120.180.A.8.[13] The purpose section of TCDC Chapter 18.134 also refers to granting variances from "the applicable zoning requirements of this title," indicating that a variance is potentially available from any provision of the TCDC. Further, TCDC 18.134.050.B and C indicates that variances to certain TCDC provisions (subdivision and access requirements) cannot be approved under TCDC Chapter 18.134. Thus, the TCDC indicates the two instances where the variance process of TCDC Chapter 18.134 is *not* applicable. We believe that if the city had intended TCDC Chapter 18.134 to be applicable *only* to the zoning district provisions of TCDC Chapters 18.40 to 18.86, it would have so indicated.

Because the variance process of TCDC Chapter 18.134 provides petitioners with a means of seeking administrative relief from the disputed condition requiring dedication of a portion of their property, and petitioners have not pursued that relief, petitioners' federal and state taking claims are not ripe for review.

---

[13] We note that the TCDC 18.86.040.A.1.b(i) requirement for dedication of land for pedestrian and bike paths quoted above is a provision of the AA overlay *zoning district* and, therefore, would be subject to the variance process of TCDC Chapter 18.134 even under petitioners' interpretation of the applicability of TCDC Chapter 18.134.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

> "The city's requirement that the 'roof sign' be removed within 45 days of occupancy of the new building was unreasonable and hence a denial of due process."

The challenged decision includes the following condition:

> "The existing roof sign shall be permanently removed from the subject property within 45 days of the issuance of the Occupancy Permit for the new building." Record 40.

Petitioners contend the "roof sign" referred to in the above quoted condition is a structural part of the existing building which is planned to be demolished after occupancy of the new building. Petitioners argue that it is unreasonable to require them to move their retail business into the new building, obtain a demolition permit and raze the existing structure, all within 45 days of receiving an occupancy permit for the new building. Petitioners state they told the city they would agree to a 90 day period, and complain that the city's decision does not articulate reasonable grounds for reducing that time period to 45 days.

5 Petitioners do not challenge the city's authority to require that they remove the existing roof sign as a condition of site development review approval. Rather, petitioners contend that allowing them only 45 days after obtaining an occupancy permit for the new building to accomplish removal of the sign, rather than 90 days, is a

"denial of due process." Petitioners presumably intend this phrase to indicate that the city's decision is unconstitutional in some way and, therefore, subject to reversal or remand under ORS 197.835(7)(a)(E). However, no argument supporting an allegation of unconstitutionality is provided in the petition for review. This Board has consistently declined to consider claims of constitutional violations where, as here, they are unsupported by legal argument. *Van Sant v. Yamhill County*, 17 Or LUBA 563, 566-67 (1989); *Faulkender v. Hood River County*, 17 Or LUBA 360, 366 (1989); *Portland Oil Service Co. v. City of Beaverton*, 16 Or LUBA 255, 269 (1987); *Chemeketa Industries Corp. v. City of Salem*, 14 Or LUBA 159, 165-66 (1985).

The third assignment of error is denied.

The City's decision is affirmed.

APPENDIX F

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JOHN T. DOLAN and FLORENCE DOLAN, Petitioners, vs. CITY OF TIGARD, Respondent.	)	LUBA No. 91-161 NOTICE OF APPELLATE JUDGMENT

The Court of Appeals issued an opinion in *Dolan v. City of Tigard*, CA A73769, on May 20, 1992. The Supreme Court issued an opinion in *Dolan v. City of Tigard*, SC 39393, on July 1, 1993. The appellate judgment was filed on July 28, 1993.

The appellate court decisions in this case require no change in our final opinion and order dated February 7, 1992.

The city's decision is affirmed.

Dated this 9th day of August, 1993.

/s/ Corinne C. Sherton
Corinne C. Sherton
Chief Referee

APPENDIX G

CITY OF TIGARD, OREGON

RESOLUTION NO. 91-66

IN THE MATTER OF THE ADOPTION OF A FINAL ORDER UPON CITY COUNCIL REVIEW OF AN APPEAL OF A PLANNING COMMISSION DECISION TO APPROVE A SITE DEVELOPMENT REVIEW AND VARIANCE APPLICATION (SDR 91-0005, VAR91-00100) PROPOSED BY JOHN DOLAN.

WHEREAS, a Director's decision was appealed to the Planning Commission by the applicant for further consideration; and

WHEREAS, the Commission reviewed the case at its meeting of July 8, 1991; and

WHEREAS, the Commission upheld the Director's decision with modification to the original conditions of approval (Final Order No. 91-09 PC); and

WHEREAS, this matter came before the City Council at its meeting of September 10, 1991, upon the request of the applicant; and

WHEREAS, the Council reviewed the evidence related to the applicant's appeal; and

THEREFORE BE IT RESOLVED, that the requested appeal is allowed in part and denied in part, and the Planning Commission decision is upheld as modified based upon the facts, findings, and conclusions noted in Planning Commission Final Order No. 91-09 PC (Exhibit "A" as modified)

The Council further orders that the City Recorded send a copy of this final order to the applicant as a notice of the final decision in this matter.

PASSED: This 10th day of September, 1991.

APPROVED: This 17th day of September, 1991.

/s/ Gerald R. Edwards
Gerald R. Edwards, Mayor
City of Tigard

ATTEST:

/s/ Catherine Wheatley
Tigard City Recorder

CITY OF TIGARD
Washington County, Oregon

NOTICE OF FINAL ORDER - BY CITY COUNCIL

1. Concerning Case Number(s): SDR 91-0005/ VAR91-0010 (Appeal)
2. Name of Owner: John T. & Florence Dolan
   Name of Applicant: Knappenberger & Mendez
3. Address 1318 SW 12th Avenue City Portland State OR Zip 97201
4. Address of Property: 12520 SW Main Street
   Tax Map and Lot No(s).: 2S1 2AC, tax lot 700
5. Request: An appeal by John Dolan of a Planning Commission decision to deny a requested variance subject to conditions requiring the applicant to: (1) dedicate to the City as greenway all property within the 100 year

flood plain; (2) dedicate property 15 feet above the 150 foot floodplain boundary for a pathway; (3) survey the boundaries of the dedication; and (4) remove a roof sign within 45 days of the issuance of an occupancy permit for the new building. ZONE: CBD-AA (Central Business District zone with the Action Area overlay zone)

6. Action:
   ___ Approval as requested
   ___ Approval with conditions
   ___ Denial
   X Approved in part, denied in part

7. Notice: Notice was published in the newspaper, posted at City Hall, and mailed to:
   X The applicant and owner(s)
   X Owners of record within the required distance
   X The affected Neighborhood Planning Organization
   X Affected governmental agencies

8. Final Decision: THE DECISION WAS SIGNED ON 9/17/91, AND BECOMES EFFECTIVE ON 9/17/91.

   The adopted findings of fact, decision, and statement of conditions can be obtained from the Planning Department, Tigard City Hall, 13125 SW Hall, P.O. Box 23397, Tigard Oregon 97223.

   A review of this decision may be obtained by filing a notice of intent with the Oregon Land Use Board of Appeals (LUBA) according to their procedures.

9. QUESTIONS: If you have any questions, pleas call the Tigard City Recorder at 639-4171.

EXHIBIT "A"

CITY OF TIGARD PLANNING COMMISSION
FINAL ORDER NO. 91-09 PC

A FINAL ORDER INCLUDING FINDINGS AND CONCLUSIONS WHICH UPHOLDS A DECISION OF THE COMMUNITY DEVELOPMENT DIRECTOR'S DESIGNEEE [sic] (SDR0005) AND VARIANCE (VAR 91-0010) REQUESTED BY JOSEPH MENDEZ (JOHN AND FRANCES DOLAN, PROPERTY OWNERS).

The Tigard Planning Commission has reviewed the above application, on appeal, at a public hearing on July 8, 1991. The Commission has based its decision on the facts, findings, and conclusions noted below.

SUMMARY OF APPLICATION

REQUEST:
a) Site Development Review approval is requested to allow construction of a 17,600 square foot retail sales building on a 1.67 acre site;

b) Variances are requested to the following Community Development Code requirements:

   ___ i. Code Section 18.120.180.A.8 (Site Development Review approval standards) which requires dedication of sufficient open land area for greenway adjoining and within the floodplain where development is allowed adjacent to the 100-year floodplain. In addition, this section requires that the dedication include area at a suitable elevation

for the construction of a pedestrian/bicycle pathway. The requirement of area for a pathway as well as construction of the pathway is also made by Code Section 18.86.040.A.1.b (Action Area overlay zone interim requirements). The applicant requests that floodplain and pathway areas not be required to be dedicated and also that pathway construction not be required as a condition of approval of the Site Development Review request.

ii. Section 18.106.030.C.20 (minimum off-street parking requirements) which requires provision of one off-street parking space for every 400 square feet of general retail sales area. The applicant requests approval of a site plan that would provide a 39 parking space parking lot whereas 44 spaces would be required for the size of the proposed building to be used for general retail sales.

iii. Section 18.114.070.H (certain signs prohibited) which prohibits roof signs of any kind. The applicant requests that the City not require removal of a sign above the roof line of an existing building on the site as a condition of approval of the current development application. The applicant characterizes

the sign as a wall sign built on a wall parapet.

APPLICANT: Joseph R. Mendez, Attorney at Law
1318 SW 12th Avenue
Portland, OR 97201

OWNER: John and Florence Dolan
1919 NW 19th Avenue
Portland, OR 97209

LOCATION: 12520 SW Main Street (WCTM 2S1 2AC, TL 700)

COMPREHENSIVE PLAN DESIGNATION: Central Business District

ZONE DESIGNATION:CBD-AA (Central Business District, Action Area overlay zone)

PRIOR BACKGROUND

The property's owners previously applied for Site Development Review approval for plans that are largely the same as the plans that are presently under review. The applicant also requested a variance to the parking standard for general retail sales to allow 39 parking spaces to serve development on the site whereas 44 spaces would normally be required. The Site Development Review and the Variance requests were approved on July 10, 1989 by the Planning Director subject to 14 conditions.

The applicant appealed the Director's decision to the Planning Commission. The applicant raised concerns with five conditions of approval that were imposed by the Director's decision, including conditions requiring floodplain and greenway area dedication, construction of a

bicycle/pedestrian pathway within the greenway to be accomplished by the applicant, and removal of a non-conforming roof sign from an existing building prior to the issuance of an occupancy permit for the new building. The Planning Commission upheld the Director's decision, except that the condition requiring removal of the roof sign was modified to require removal to occur within 45 days of the issuance of the occupancy permit (Final Order PC 89-25 dated December 15, 1989).

The applicant then appealed the Planning Commission's decision to the City Council challenging the same five conditions. The City Council upheld the Planning Commission's decision, with one modification. The Council reassigned the responsibility for surveying and marking the floodplain area from the applicant to the City's engineering/surveying department (Council Resolution 90-07 dated February 5, 1990).

The applicant appealed the Council's decision to the Oregon Land Use Board of Appeals (LUBA). On January 24, 1991, LUBA denied the appeal thereby upholding the City's decision on this matter (LUBA Final Order and Opinion No. 90-029).

Prior to the above-described Site Development Review and Variance request, the only other City of Tigard land use or development actions directly related to this parcel are a series of notices regarding nonconforming signs on the property. Two freestanding billboard signs and one large roof sign on the property have been considered nonconforming as of March 20, 1988, and property and business owners were notified

of this prior to that time. A voluntary compliance agreement has been used to provide affected downtown properties an extension of time until a City Center Plan is adopted. The voluntary compliance agreement sent to the owners of the subject parcel has never been signed. The property and business owners have been cited for the following nonconformities:

A. Roof sign, a violation of Section 18.114.070.H; and

B. Two nonconforming, amortized billboards (illegal location), violations of Code Section 18.114.090.A.4.a.

SITE INFORMATION AND PROPOSAL DESCRIPTION

Properties surrounding the subject site are also zoned CBD-AA (Central Business District – Action Area) and contain a variety of commercial uses. Property immediately to the west contains the Fanno Creek floodplain and is designated in Tigard's Comprehensive Plan to be included as part of the City's greenway/open space system.

The subject site is approximately 1.67 acres in size and is bordered by Fanno Creek on the southwestern side. The site includes a 9,700 square foot building and a partially paved parking lot which have been in their present locations since approximately the late 1940s. A freestanding sign with a readerboard stands along the Main Street frontage of the property. Two large billboards stand on or near the property's northeastern boundary.

The property's owners plan to raze the existing structure, currently used by A-Boy Electric and Plumbing Supply – a general retail sales use, and to embark on a multi-phase redevelopment of the site. The building will be razed in sections corresponding to progress on the construction of the first phase of redevelopment of the site. The current proposal includes development of a 17,600 square foot, single story structure on the southwestern side of the site for relocation of the A-Boy Electric and Plumbing Supply operations. The plans also show an outline of a phase two building on the northeastern side of the site. No details have been provided for the building in phase two.

A parking lot containing 39 parking spaces intended to serve the phase one building is proposed between the two phases. One designated handicapped parking space and a 3 bicycle rack are also proposed. The site plan also indicates an area for additional parking for phase two.

The applicant requested variances to Community Development Code standards requiring dedication of area of the subject parcel that is within the 100 year floodplain of Fanno Creek and dedication of additional area adjacent to the 100 year floodplain for a bicycle/pedestrian path, as well as the requirement for construction of the pathway in this area. In addition, the applicant requested a variance to the Code prohibition against roof signs. Through this request, the applicant is requesting reconsideration of the earlier City determination that an existing sign on the present building on the site is a roof sign. The applicant also requested reconsideration of an earlier Council directive that would

require the sign on the existing building to be removed within 45 days of occupancy of the proposed new building.

In addition, staff also considered a variance request previously made by the property's owners in 1989 for a reduction in parking spaces, even though the applicant neglected to raise this issue with the current application. The parking variance considered would allow 39 parking spaces to suffice for the proposed phase one development whereas Community Development Code Section 18.106.030.C.20 requires one parking space for every 500 square feet of building area for general retail sales, or in this case 44 spaces. The City is under no obligation to reconsider this variance since the applicant failed to raise the issue with the current application; however the Commission believes there is a need to reconsider the variance for the City's own administrative purposes. The variance is reconsidered as part of the present application so that there will not be different approvals with different approval periods regarding this site and site plan. The previously approved variance related to parking was issued by the City Council on February 5, 1990. This approval is valid for eighteen months from the date of issuance. Therefore, that approval is likely to expire before development proposed by the current application can begin. Reconsideration and reapprova[illegible]the parking variance at this time would reset the clock for that variance so that the variance approval period would be concurrent with the approval period for the new Site Development Review application. On May 24, 1991, the Community Development Director's designee approved the Site Development

Review request and the Variance related to parking. The approval was subject to 16 conditions. The other variance requests were denied.

AGENCY AND NPO COMMENTS

The City Building Division notes that a canopy and an 8-foot tall solid plywood fence must be installed behind the sidewalk/public right-of-way along SW Main Street (from the southwestern property line to a minimum of 20 feet beyond the new building) prior to start of construction and must remain until all construction is complete (Uniform Building Code section 4407(c). A demolition permit will be required for the removal of any or all of the existing building.

The City Engineering Division has reviewed the proposal and has the following comments:

A. Streets:

The site fronts S.W. Main Street which is classified as a major collector street. Main Street along the site's frontage is fully developed with curbs and sidewalks.

A 1986 engineering study of the condition of S.W. Main Street recommends that the pavement be completely reconstructed and that the storm drainage system be replaced. It appears to be impractical to perform the proposed reconstruction of Main Street in a piecemeal fashion on a lot-by-lot basis; instead, the reconstruction needs to occur in larger segments beginning at Fanno Creek Bridge and working uphill. Therefore, we do not propose that any reconstruction of

Main Street be required as a condition of approval of this development proposal.

This development should be required to replace any existing sidewalks and curbs which are damaged or in poor repair and to reconstruct any existing curb cuts which are being abandoned.

As part of the Tigard Major Streets Transportation Safety Improvement Bond, the City plans to replace the Main Street Bridge over Fanno Creek. The bridge replacement is scheduled to begin in June 1991. The bridge construction is expected to occur within the existing right-of-way and should have little impact on the subject site.

B. Sanitary Sewer:

There are two sanitary sewer truck lines that cross the site in existing easements. One line is 24 inches in diameter and the other is 60 inches in diameter. The applicant has shown on the application plans the easement and location for the 24 inch line but not the easement and location for the 60 inch line. Additionally, after reviewing the sanitary sewer system plans on file in this office, it appears that there may be some mix-up as to where the sanitary sewer system is as shown on the applicants submitted plans. Basically, it appears that the 24 inch line is within a 10 foot easement and goes along the front of the proposed new building and diverges to the east as you go south. The 60 inch line is within a 30 foot easement and again is in front of the proposed new building but does not diverge as fast to the east as you go south. Based on

the plan submitted by the applicant and the "as-built" plans for both the sanitary sewer systems, it appears that the new building would be located over the easement for the 60 inch line by approximately 6 to 8 feet at the approximate middle of the building. Therefore, the applicant should be required to submit evidence as to the actual location of the sanitary sewer lines and easements, and their relationship to the proposed building. If it is determined that the submitted proposal for the building does encroach upon the easement, the applicant should be required to change the location of the building or the design so that it does not encroach upon the easement or to provide evidence that the Unified Sewerage Agency does not object to the encroachment.

C. Storm Sewer:

The City's Master Drainage Plan recommends improvements to the Fanno Creek channel downstream from Main Street. The proposed channel improvements would include widening and slope stabilization. These improvements would move the location of the top of bank approximately five feet closer to the proposed building than the location of the existing top of bank. Therefore, an adjustment of the building location will have to occur in order to accommodate the future City-initiated relocation of the floodplain bank. This should be required on a revised site plan. In addition, dedication of the land area on this property below the elevation of the 100-year flood should be required.

The Unified Sewerage Agency has established and the City has agreed to enforce (Resolution No. 90-43) Surface Water Management Regulations requiring the construction of on-site water quality facilities or fees in lieu of their construction. Requiring surface water quality facilities on small sites could result in numerous facilities that could become a maintenance burden to the City. Furthermore, the applicant has not proposed any such facilities and there are no natural depressions or other areas of this site that are particularly suitable for water quality facilities. Regional facilities, funded by fees in lieu of construction of smaller isolated facilities, would provide the required treatment with improved reliability and less maintenance. Consequently a fee-in-lieu of the construction of on-site water quality facilities should be assessed.

D. Traffic Impact Fee:

Washington County has established and the City has agreed to enforce (Resolution No. 90-65) Traffic Impact Fees. The purpose of the fee is to ensure that new development contributes to extra-capacity transportation improvements needed to accommodate additional traffic generated by such development. The applicant will be required to pay the fee.

Based on the following information, the *ESTIMATED TIF* for this development would be:

1) Use: Retail Sales

2) Land Use Category: Business & Commercial

3) Rate per trip: $34.00

4) ITE Category: 816

5) Weekday average trip rate: 53.21 per T.G.S.F.

6) Existing Square Footage: 9,720 approximately

7) Proposed Square Footage: 17,600

8) TIF = 53.21 X (17.6 - 9.720) X $34.00 = $14,256.02

NOTE: THIS IS ONLY AN ESTIMATE OF THE APPLICABLE TIF FEE. THE ACTUAL FEE WILL BE CALCULATED AT TIME OF BUILDING PERMIT APPLICATION. The actual TIF will be based on the total square footage shown in the building plans, the trip rate in effect at the time of building permit application, and the fee rate in effect at that time.

The City of Tigard Parks Department recommends that area adjacent to the floodplain should be required to be dedicated for pathway construction.

The Tualatin Valley Fire and Rescue District notes that automatic sprinkler protection or some other means of built-in fire protection will be required. In addition, a fire hydrant must be provided within 500 feet of all exterior portions of the proposed structures, but not greater than 70 feet from a fire department connection.

Portland General Electric and the Tigard Water District, have reviewed the proposal and have no objections to it.

No other comments were received.

ANALYSIS AND CONCLUSION

Section 18.120.180 lists the standards whereby the approval authority is to approve, approve with modifications or deny a request for Site Development Review approval. In addition to those contained in Chapter 18.66, Central Business District, the following sections of the Tigard Community Development Code are also applicable: Chapter 18.86, Action Areas; Chapter 18.100, Landscaping and Screening; Chapter 18.102, Visual Clearance Areas; Chapter 18.106, Off-street Parking and Loading; Chapter 18.108, Access, Egress and Circulation; Chapter 18.114, Signs; Chapter 18.120, Site Development Review; and Chapter 18.134, Variances.

In addition to all of the above approval criteria, this order will review the proposal in light of the Parks Master Plan for Fanno Creek Park.

Chapter 18.66: Central Business District Zone

The applicant intends to construct a new and larger structure suited for general retail sales use. Such a use is permitted outright in the CBD (Central Business District) zone. Therefore, the intended use is acceptable for this site.

The CBD zoning district does not require any minimum building setbacks except that a 30 foot setback is required if any side of the property abuts a residential zoning district. Since none of the four sides of the subject property abut a

residential zoning district, no other building setbacks are required. The proposed 16.5 building height is consistent with the maximum 80 foot building height permitted in the zone.

In the CBD zoning district, maximum site coverage allowed is 85 percent. Site coverage includes all structures and impervious surfaces such as parking, loading areas, sidewalks and pathway areas. A minimum of 15 percent of the site must be landscaped. These standards will be reviewed during the discussion of landscaping and screening below.

Chapter 18.86: Action Area Overlay Zone

The "AA" portion of the subject site's zoning designation indicates that an additional "layer" of zoning regulations has been imposed on this property. The purpose of the Action Area Overlay designation is to implement the policies of the Tigard Comprehensive Plan for action areas which include provisions for a mixture of intensive land use. Since permitted uses in the Action Area overlay zone must be those specified in the underlying zoning district; in this case, the CBD zone; this requirement has been met.

Code Section 18.86.040 contains interim standards which are to be addressed for new developments in the CBD-AA zone. These requirements are intended to provide for projected transportation and public facility needs of the area. The City may attach conditions to any development within an action area prior to adoption of the design plan to achieve the following objectives:

a. The development shall address transit usage by residents, employees, and customers if

the site is within 1/4 mile of a public transit line or transit stop. Specific items to be addressed are as follows:

i. Orientation of buildings and facilities towards transit services to provide for direct pedestrian access into the building(s) from transit lines or stops;

ii. Minimizing transit/auto conflicts by providing direct pedestrian access into the buildings with limited crossings in automobile circulation/parking areas. If pedestrian access crosses automobile circulation/parking areas, paths shall be marked for pedestrians;

iii. Encouraging transit-supportive users by limiting automobile support services to collector and arterial streets; and

iv. Avoiding the creation of small scattered parking areas by allowing adjacent development to use shared surface parking, parking structures or under-structure parking;

b. The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designated bike paths or adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:

i. Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bike paths identified in the comprehensive

plan. If direct connections cannot be made, require that funds in the amount of the construction cost be deposited into an account for the purpose of constructing paths;

ii. Separation of auto and truck circulation activities from pedestrian areas;

iii. Encouraging pedestrian-oriented design by requiring pedestrian walkways and street level windows along all sides with public access into the building;

iv. Provision of bicycle parking as required under Subsection 18.106.020.P; and

v. Ensure adequate outdoor lighting by lighting pedestrian walkways and auto circulation areas.

c. Coordination of development within the action area. Specific items to be addressed are as follows:

i. Continuity and/or compatibility of landscaping, circulation, access, public facilities, and other improvements. Allow required landscaping areas to be grouped together. Regulate shared access where appropriate. Prohibit lighting which shines on adjacent property;

ii. Siting and orientation of land use which considers surrounding land use, or an adopted plan. Screen loading areas and refuse dumpsters from view. Screen commercial, and industrial use

from single-family residential through landscaping; and

iii. Provision of frontage roads or shared access where feasible.

The submitted development proposal satisfies the above requirements for transit usage. The subject site is within one quarter mile of several Tri-Met bus stops on Main Street and Pacific Highway. The site plan provides an on-site sidewalk providing a direct connection between the public sidewalk on Main Street with the entrance to the proposed building. The proposed parking lot's relatively narrow width will minimize pedestrian/vehicle conflicts because of the relatively short distance pedestrians must travel between their cars and the sidewalk and entrance to the building.

The proposed development plan is reasonably coordinated with other development within the action area. The site improvements will be required to satisfy Code landscaping requirements as described below. Screening of the truck loading area on the southern portion of the building can be accomplished with either a fence or tall vegetation. Outdoor lighting should be specifically addressed by the applicant as to how it might be provided. These modifications or clarifications can be accomplished as minor amendments to the site plan prior to building permit issuance.

The proposal is consistent with only some of the Action Area overlay zone requirements related to pedestrian and bicycle circulation, as described below. Pedestrian areas are adequately separated from vehicle circulation areas

by curbs and landscaped areas. The northeastern side of the building will include a pedestrian walkway and windows along the side of the building that will provide pedestrian access. Adequate lighting of the public and private sidewalks and the parking lot will be provided by parking area lights and building mounted lights. The proposed development would be provided with adequate bicycle parking as required by Code Section 18.106.020.P which requires one bicycle rack parking space for every 15 auto spaces, or portion thereof. The site plan proposes a three-bicycle bike rack at the northeastern corner of the building, adjacent to the public sidewalk.

Variance requested. The application includes a request for a variance from the requirement of dedication of adequate area for and construction of a bicycle/pedestrian path along the site's western side adjacent to Fanno Creek as well as dedication of the floodplain area on the site itself. Because the requirement for pathway area and construction is raised by Code Section 18.86.040 separate from the requirement for floodplain dedication and dedication of sufficient area for a pathway, the Commission will consider the requirement for floodplain dedication separately later in this report.

A bicycle/pedestrian path is called for in this general location in the City of Tigard's Parks Master Plans (Murase and Associates, 1988) and the Tigard Area Comprehensive Pedestrian/Bicycle Pathway Plan 1974). In addition, Community Development Code Section 18.120.180.A.8 requires that where landfill and/or development is allowed within or adjacent to

the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with adopted pedestrian/bicycle plan. The proposed development site includes land within the 100-year floodplain of Fanno Creek.

Section 18.1.34.050 of the Code contains criteria whereby the decision-making authority can approve, approve with modifications or deny a variance request:

(1) The proposed variance will not be materially detrimental to the purposes of this Code, be in conflict with the policies of the Comprehensive Plan, to any other applicable policies of the Community Development Code, to any other applicable policies and standards, and to other properties in the same zoning district or vicinity.

(2) There are special circumstances that exist which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, and which are not applicable to other properties in the same zoning district;

(3) The use proposed will be the same as permitted under this Code and City standards will be maintained to the greatest extent possible, while permitting some economic use of the land;

(4) Existing physical and natural systems, such as but not limited to traffic, drainage, dramatic land forms or parks will not be adversely affected any more than would

occur if the development were located as specified in the Code; and

(5) The hardship is not self-imposed and the variance requested is the minimum variance which would alleviate the hardship.

Applicant's Variance Justification. The applicant has provided the following as a statement of justification that is intended to cover all of the requested variances:

> The variance requested by the applicant should be allowed as the conditions and dedications required by the City of Tigard violate the applicant's rights under the Oregon and United States Constitutions. Specifically, the City's demand for dedication constitute an unlawful taking and violation of the Oregon Constitution, Article 1, Section 18 and the Fifth Amendment to the United States Constitution.
>
> The proposed variance will not materially be detrimental to the purposes of the title nor conflict with the policy of the comprehensive plan as no park exists at this time nor does the City have sufficient funding in which to create a park that the bicycle/pedestrian path is theoretically going to be used to access.
>
> There are special circumstances that exist which are peculiar to the lot in that the building which the applicant proposes to construct cannot be erected without invading the City's proposed bicycle/pedestrian path if the land is dedicated.
>
> The hardship is not self-imposed but rather imposed by the City's dedication and the

> variance requested is the minimum variance which would alleviate the hardship to the applicant.

Analysis of Variance Request. The Commission does not find that the requirements for dedication of the area adjacent to the floodplain for greenway purposes and for construction of a pedestrian/bicycle pathway constitute a taking of the applicant's property. Instead, the Commission finds that the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

The Commission finds that the requested variance would conflict with many Plan and Code

purposes. As already noted, the Code at Section 18.120.080.A.8 and many other related sections (e.g., Section 18.84.040.A.7) require dedication of sufficient area adjacent to floodplain areas for construction of pedestrian/bicycle pathways. Volume 1 of the Comprehensive Plan at pages 256 through 258 provides a discussion of the reasons for development of a City-wide pathway system as part of a multi-modal transportation system serving the varied needs of the City's citizens and businesses. This section essentially summarizes the findings of the adopted Tigard Area Comprehensive Pedestrian/Bicycle Pathway Plan. Comprehensive Plan Volume 2 at Policy 8.4.1 calls for the City to require the dedication of area for and construction of pedestrian/bicycle pathways as a condition of development approval for areas identified by the adopted pedestrian/bicycle plan. The Plan notes that as the city grows, more people may rely on the pathways for utilitarian as well as recreational purposes and that there is a need to develop a safe and convenient pathway system. The pathway system along Fanno Creek near the subject site is already partly constructed in both directions. The City is actively pursuing land acquisition and park improvement planning for Fanno Creek Park to the south. Contrary to the applicant's statement that "... no park exists at this time nor does the City have sufficient funding in which to create a park that the bicycle/pedestrian pathway is theoretically going to be used to access," the City has established Fanno Creek park, constructed a pathway and other improvements in area to the south, recently purchased 3.19 additional acres for park expansion, and has set aside funds for a

partial extension of the pathway in the summer or fall of 1991.

It is imperative that a continuous pathway be developed in order for the paths to function as an efficient, convenient, and safe system. Omitting a planned for section of the pathway system, as the variance would result in if approved, would conflict with Plan purposes and result in an incomplete system that would not be efficient, convenient, or safe. The requested variance therefore would conflict with the City's adopted policy of providing a continuous pathway system intended to serve the general public good and therefore fails to satisfy the first variance approval criterion.

The Commission fails to find special circumstances that exist which are peculiar to this site for which the applicant has no control and therefore the second criterion for approval of a variance is not satisfied. The applicant states that the inability to develop the proposed building without invading the City's intended pathway area is a special circumstance dictating the need for a variance. The design of the building is completely under the control of the applicant. The applicant's engineer was apprised of the need to provide area for the pathway at the pre-application conference with City staff prior to the submittal of the site plan. The applicant's engineer could have designed the building with respect to the need for dedication for the pathway. The applicant has not submitted any reasons supporting why the same amount of building square footage could not be provided on multiple levels or why the proposed square

footage is needed. If the building must be developed on a single level and at the same square footage, other options may exist for varying Code standards that would not have such a detrimental effect on public purposes as the requested variance. The Commission finds that the applicant has not met the burden of proof regarding special circumstances affecting this site related to the requested variance.

The requested variance would not affect uses of the site permitted by the Code. The applicant has not addressed how City standards (i.e., the connection of the various pathway segments) will be accomplished if the variance request is approved. Therefore, the third variance approval criterion is only partially satisfied.

As noted above, approval of the variance request would have an adverse effect on the existing partially completed pathway system because a system cannot fully function with missing pieces. If this planned for section is omitted from the pathway system, the system in this area will be much less convenient and efficient. If the pedestrian and bicycle traffic is forced onto City streets at this point in the pathway system because of this missing section, pedestrian and bicycle safety will be lessened. The fourth variance approval criterion is therefore not satisfied.

As noted above, the applicant has not provided reasons why the building must be constructed with the proposed footprint, square footage, or on a single level. Without such evidence, the Commission finds no evidence of hardship that would result if strict compliance with the Code dedication and pathway construction standards

are required. Again, the Commission finds that the applicant has not satisfied the burden of proof related to the variance request. Without evidence of a hardship, the fifth variance approval criterion is not met.

The criteria for approval of a variance to the Community Development Code requirement of dedication of sufficient area for and construction of a pedestrian/bicycle pathway in conformance with various adopted City plans calling for the pathway are therefore not satisfied. The applicant has failed to provide adequate evidence or reasons addressing the criteria. The request is therefore denied. The applicant will be required to dedicate area 15 feet in depth from the east bank of Fanno Creek and will be required to construct an 8 foot wide pedestrian/bicycle pathway in this area. The footprint and possibly the design of the proposed building will need to be revised to comply with this requirement.

Chapter 18.102: Landscaping and Screening

Although not noted in the submittal for the current application, the applicant previously has requested that in return for dedication of property along Fanno Creek, other landscaping standards should be waived. The Commission will consider an exception from the minimum landscaped site area on the net site after required dedications because this decision rejects the applicant's variance requests from floodplain and pathway dedication requirements.

The Planning Commission finds that the City has previously allowed the inclusion of dedicated floodplain/park land for the purpose of

calculating required landscaped area for other projects. Such an allowance is also appropriate in this instance. The site plan does not note the amount of landscaped area that would be provided on the net site after floodplain and pathway area dedications, but the plan notes that 21 percent of the gross site would be landscaped area or natural area. This percentage is consistent with the 15 percent minimum landscaped area standard of the CBD zoning district as well as with Section 18.120.170.E which allows the director to grant an exception to the minimum landscaped area requirements upon a finding that the overall landscaped plan provides for at least 20 percent of the gross site to be landscaped.

The City Council decided, with regard to the earlier Site Development Review request for this site, that the City would be responsible for landscaping and screening the area between the required pedestrian/bicycle path and the proposed building. The Commission will hold with the Council's earlier decision regarding this area and therefore will not review the applicant's landscaping plans for this area adjacent to the future pathway and Fanno Creek. The provision of a landscaped buffer by the City along the east edge of area required to be dedicated for pathway purposes is justified because the maintenance of this area will be the City's responsibility and the future storm drainage and pathway improvements will cause the destruction or removal of existing vegetation.

Code Section 18.100.030.A requires that all development projects fronting on a public or private street provide street trees spaced

between 20 and 40 feet, depending on the mature size of the trees. The site plan proposes only one flowering pear tree along the site's Main Street frontage. The proposed flowering pear tree would be located in a planter on the west side of the entrance driveway to the parking lot. Because the proposed building would abut the public sidewalk further west from the driveway, no additional trees can be located west of the driveway. The City will be responsible for landscaping west of the proposed building. This area should include a street tree or two. Approximately 85 feet to the east of the proposed driveway is not shown to include any landscaping, building, or paving. The landscaping plan will need to be revised to include additional street trees consistent with the size and spacing standards of Section 18.100.035.

Chapter 18.102: Vision Clearance

Section 18.102.020 requires that clear vision be maintained between 3 and 8 feet above grade at the intersections of all streets and driveways. The flowering pear tree intended to be planted immediately to the west of the proposed driveway need not be relocated out of this area as long as branches below eight feet in height are kept trimmed. In addition, bushes planted adjacent to the tree must be kept trimmed to below three feet in height.

Chapter 18.106: Off-street Parking and Loading

Variance to Minimum Parking Standard. The applicant proposes to construct 39 standard 90-degree parking spaces. Community Development Code Section 18.106.030.C.20 requires that

1 parking space be provide for every 400 square feet of building area. Therefore, 44 parking spaces would be required for the proposed 17,600 square foot general retail sales building. As previously noted, the applicant neglected to request a variance to this parking standard with the current request. However, the director and the Planning Commission had previously approved such a request for the earlier application utilizing the same site plan. The Commission will consider a variance to the minimum parking standard with the current application in order to affirm the earlier variance approval and to make its period of approval concurrent with the approval period for the current Site Development Review application. The following findings relative to the variance approval criteria (Code Section 18.134.050) are essentially the same as previously adopted by the Planning Commission and City Council with regard to the earlier application affecting this site.

Special circumstances exist which are peculiar to this site and proposal. The applicant proposes to construct this project in two phases: the first phase consists of construction of the new building on the southwestern portion of the property. The existing building would then be demolished. The applicant hopes to attract a complimentary [sic] business(es) to build on the northern portion of the lot as part of Phase 2. Should additional parking be found to be necessary in the future, the applicant suggests that a shared parking arrangement could be worked out with the adjacent structure.

The applicant points out that the A-Boy store does not attract "browser or window shoppers",

in that the business constitutes a retail/wholesale type of business which sells bulky merchandise. The latter fact results in the attraction of customers who decide in advance of travel that a product is needed and who travel to a specific destination to obtain that product. The applicant has stated that the existing store rarely has more than six or eight vehicles at any one time. The Commission notes that employees of the business will also require parking spaces and perhaps delivery trucks will need to park and unload on the property; however, it is clear that the existing store use should not need 44 parking spaces. The City agrees that the present use is similar to a "general retail sales, bulky merchandise" use. If the City were to employ the parking standard used for retail sales businesses which sell bulky merchandise, namely 1 space for every 1000 square feet of gross floor area but not less than 10 spaces, it is clear that the proposed 39 spaces are well within City parking requirements.

Although the use of the building may later change, alternatives are available in conjunction with the future phase of construction on this property. If a new use, which has a higher parking demand, occupies the building, a new site development review and evaluation of parking would be required. The issue of parking space numbers will also be evaluated as part of the site development review for phase two of this development. The use will be the same as permitted by City regulations and existing physical and natural systems will not be affected by this proposal. Therefore, the Commission finds that the variance related to parking is justified.

Other parking standards. The Code requires one secure bicycle parking space for every 15 required automobile spaces. In this case a minimum of three bicycle parking spaces are needed. The site plan indicates a proposed location for a 3 space bike rack. This standard is therefore satisfied.

The site plan does not provide for an appropriate number of designated handicapped parking spaces as required by the Oregon Revised Statutes (2 required; 1 proposed), although the 1 space proposed would satisfy City of Tigard Community Development Code standards as currently written. The site plan will therefore need to be revised to add one additional designated handicapped parking space. The Community Development Code will need to be revised to reflect this more stringent standard that took effect on September 1, 1990.

Code Section 18.106.020.M requires parking lot landscaping in accordance with the requirements of Chapter 18.100. That chapter requires the provision of trees in the area of a parking lot at a minimum ratio of 1 tree per 7 parking spaces. The site plan proposes 7 trees in landscaped islands within and adjacent to the 39 space parking lot. This standard is therefore satisfied.

Code Section 18.106.080.A requires at least one off-street loading space for commercial uses having more than 10,000 square feet of floor area. The site plan proposes a loading area on the south side of the proposed building. This standard is therefore satisfied. However, the loading space will need to be provided with

adequate screening from views from neighboring parcels as has previously bee described.

Chapter 18.108: Access, Egress and Circulation

Code Section 18.108.40.C requires that vehicular access be provided to commercial and industrial uses within 50 feet of the primary ground floor entrances to the building. The proposed parking lot is immediately adjacent to the proposed building entrance. Code Section 18.108.50.A requires walkways connecting ground floor entrances of commercial buildings with adjacent public streets. The site plan proposes a sidewalk along the front of the building connecting to the public sidewalk along Main Street. Code Section 18.108.80.A requires a minimum of one 24-foot wide access driveway to a parking lot of this size serving a commercial use. One 36-foot wide driveway would connect the proposed parking lot with Main Street. The proposed access and circulation pattern should provide adequate and safe access for the proposed use. Therefore, the Code's requirements for access and circulation have been satisfied.

Chapter 18.114: Signs

The applicant has proposed no new signage in conjunction with this application. The existing free standing sign will apparently be removed. All new wall and free standing signs must be reviewed by the Planning Division prior to their erection for conformity with the City Sign Code.

The two billboard signs and roof sign are in direct conflict with Code Section 18.120.180,

which requires that the approval of a Site Development Review be conditioned on the proposal's ability to comply with all other applicable provisions of the Code, including sign regulations of Chapter 18.114. Code Section 18.114.070.H prohibits roof signs of all types. Code Section 18.114.090.A.1.a.i.1 permits billboards in certain zoning districts only; the CBD zone is not one of the listed zones. The prior Commission and City Council reviews affecting this site have determined that the billboards and the sign atop the existing A-Boy building are nonconforming signs that have gone beyond the 10-year amortization period adopted by the City Council in 1978 and thus were required to be removed.

Consideration of sign variance. The applicant has requested a variance to the roof sign prohibition of Section 18.114.070.H. The applicant requests that the City not require removal of a sign above the roof line of an existing building on the site as a condition of approval of the current development application. The applicant characterizes the sign as a wall sign built on a parapet wall. The City Council and Planning Commission previously considered the sign and determined that the sign was a roof sign. The applicant has not submitted a variance justification statement specifically addressing the sign situation, nor has the applicant submitted any evidence related to why the sign on the existing building is not a roof sign. The previously quoted justification statement submitted by the applicant (page 12 of this report) is all that was submitted in response to the staff notifying the applicant that the application was incomplete without a statement of reasons supporting the variance

requests. Since the applicant's Statement of Justification is clearly addressing the pathway dedication and construction issues only, and since the Commission is unaware of any other reasons in support of the requested variance to the prohibition on roof signs, the Commission has no alternative but to concur with the Commission and Council's earlier determination that the sign on the existing building is a roof sign and that it must be removed within 45 days of the occupancy of the new building.

No variance request has been received with regard to the billboard signs needing to be removed as was required by the earlier development application decisions affecting this site. The applicant apparently does not contest removal of the billboard signs as a condition of development approval. Compliance with all requirements of the Community Development Code as required by Section 18.120.180 would entail complete removal of these signs prior to occupancy of the building proposed as phase one of the redevelopment of the site.

Chapter 18.120: Site Development Review

Code Section 18.120.180.A.8 requires that where landfill and/or development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/bicycle plan. This order has already dealt with the question of dedication of area outside the floodplain for pathway construction and the construction of the pathway as it relates to the provisions of the Action Area overlay

zone. At this point, the report will consider the applicant's request from the requirement to dedicate portions of the site within the 100-year floodplain of Fanno Creek for storm water management purposes. The applicant's *Statement of Justification for Variance* (page 14 of this report) does not directly address storm water drainage concerns but instead provides the general statements listed above as comments intended to apply to all of the variance requests.

The Commission does not find that the requirements for dedication of the area within the floodplain of Fanno Creek for storm water management and greenway purposes constitutes a taking of the applicant's property. Instead, the Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, the Commission finds that the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site.

The Planning Commission finds that the requested variance would conflict with many Plan and Code purposes and policies and therefore is not with the first of the variance approval criteria. As already noted, the Code at Section 18.120.080.A.8 and many other related sections (e.g., Section 18.84.040.A.7) require dedication of floodplain areas, not only for construction of pathways, but primarily to allow for public management of the storm water drainage system. These Code sections implement Comprehensive Plan Policy 3.2.4 which requires dedication of all undeveloped land within the 100-year floodplain. Volume Two of the Plan at Section 3.2 discusses the City's objectives in regulating development within and adjacent to floodplain areas to avoid hazards to the public and to downstream properties. Volume One of the Comprehensive Plan at pages 192 and 193 provides a discussion of the reasons for development of a coordinated City-wide storm water management system. Volume One of the Plan also cites the *Master Drainage Plan* for the City produced by CH2M Hill Inc. in 1981 for a further discussion of the need for public management of the storm water drainage system and for measures intended to increase the flow efficiency of Fanno Creek and other drainage channels in the city.

As noted by the Engineering Division, the *Master Drainage Plan* recommends improvements to the Fanno Creek channel downstream from the Main Street bridge. Proposed channel improvements would include channel widening and slope stabilization. These improvements would move the location of the top of bank approximately five feet closer to the proposed building

than the location of the existing top of bank. In order to accomplish these public improvements related to increasing the flow efficiency of Fanno Creek, dedication of the area of the subject site within the 100-year floodplain and also the adjacent five feet is imperative. Not requiring dedication of this area as a condition of development approval, as the applicant's variance proposal requests, would clearly conflict with purposes and policies of the Comprehensive Plan, Community Development Code, and the City's *Master Drainage Plan*.

The Commission fails to find special circumstances that exist which are peculiar to this site over which the applicant has no control that relate to the variance request. The applicant states that the inability to develop the proposed building without invading the City's intended pathway area is a special circumstance dictating the need for a variance. The Commission does not see how this statement relates to any difficulties involved in the applicant's ability to dedicate area within the 100-year floodplain of Fanno Creek. The applicant's statement refers only to land outside of the 100-year floodplain. The request therefore fails to satisfy the second of the variance approval criteria.

The requested variance to omit floodplain dedication would not affect possible uses permitted by the Code for this property. Dedication of the portion of the property within the 100-year floodplain of Fanno Creek would not be expected to diminish the usability or value of the property because the 100-year floodplain area is virtually unusable due to the year-round water flow of the Creek within a well defined

narrow channel. The applicant has not addressed how City standards (i.e., management of the interconnected storm water drainage system) can be accomplished if the variance request is approved and an important piece of the Fanno Creek stream channel is not available for public improvements to expand the channel as called for by the City's *Master Drainage Plan*. Again, the applicant fails to meet the burden of proof relative to the variance criteria. The third variance approval criterion is not satisfied.

If the area within the 100-year floodplain is not dedicated as the variance application requests, the existing storm water drainage system would be affected because additional stormwater runoff resulting from additional development, both from the subject site and elsewhere within the Fanno Creek drainage basin, is expected to increase flow within the creek and a rise in the 100-year flood elevation without the public's ability to make channel modifications in this area to offset the increase in stream flow. If dedication is required as specified by the Code, the channel of Fanno Creek in this area could be improved by public agencies as called for by the *Master Drainage Plan*. These channel improvements, here and elsewhere along the creek, would be expected to improve the channel's ability to transmit stormwater flows thereby reducing the 100-year flood elevation and reducing the possibility of floodwater damages and threats to public safety. Because the requested variance would therefore have an adverse effect upon an important physical system, the request is not consistent with the fourth variance approval criterion.

The Planning Commission finds that the applicant has failed to state what hardship would exist related to the requirement for floodplain dedication since this floodplain area is not buildable land under the City's regulations because the land in question within the floodplain is primarily the actual stream channel of Fanno Creek. Therefore, the Commission is unable to find that the applicant's request would be the minimum variance which would relieve an uncertain hardship. The fifth variance approval criterion is therefore not met.

The applicant's request for a variance from the floodplain dedication requirement of Community Development Code Section 18.120.080.A.8 is not supported by adequate documentation addressing the variance approval criteria. The variance request is therefore denied.

Additionally, the Engineering Division has noted that an adjustment of the proposed building's location will need to be made in order to accommodate the pathway and the future City initiated relocation of the floodplain bank as well as to avoid conflicts with existing sewers passing through the site. This should be accomplished on a revised site plan that will need to be largely consistent with the site plan and landscaping plans that have been reviewed or else a new Site Development Review application will be necessary. The Commission calls to the applicant's attention the provisions of Code Sections 18.120.070 and .080 which limit the degree of modification from an approved site plan that may be reviewed by the director without a new application becoming necessary.

Master Plan for Fanno Creek Park

Fanno Creek Park is a community park located along Fanno Creek between Main Street and SW Hall Boulevard in the Central Business District. The site lies within the 100-year floodplain and immediately abuts the subject property along its southwestern property line. It is hoped that the entire park will eventually contain 35 acres. The dedication of the land area within the 100-year floodplain and the eventual construction of a pathway in that area on the subject property is consistent with the City's park plans for the area.

In the City's Master Plan for Fanno Creek Park, it is stated that Fanno Creek Park is intended to become the focal point for community, cultural, civic and recreational activities. A paved urban plaza, an amphitheater, an English water garden, pathways, a tea house, a man-made enlargement of the existing pond, as well as preserved natural areas are all components foreseen for this area.

The proposed development presently under review will abut this planned community park, and at its closest point, would be no more than eight feet from the outer boundary of the 100-year floodplain. The Engineering Division has stated that the proposed structure should be at least 10 feet away from the relocated outer bank in order to accommodate an eight foot wide pathway and the planned reconstruction of the storm drainage channel along the flood plain. This indicates that an adjustment to the placement of the building on the site will be necessary in order to adequately accommodate the

path and vegetative screening up to the relocated bank of the storm drainage channel.

VI. CONCLUSION AND RECOMMENDATION

The Planning Commission concludes that the proposed development, with modifications, will promote the general welfare of the City and will not be significantly detrimental nor injurious to surrounding land uses, provided development that occurs complies with applicable local state and federal laws. To that end, the Commission unanimously upholds the May 24, 1991 decision of the Community Development Director's designee approving Site Development Review SDR 91-0005 and a Variance allowing 39 parking spaces to suffice whereas 44 parking spaces would normally be required for a general retail use. The Commission also unanimously upholds the denial of the remainder of Variance VAR 91-0010 upon finding that the applicant failed to show that the Variance request satisfied the variance approval criteria.

The Commission's approval of SDR 91-0005 is subject to the following conditions of approval:

UNLESS OTHERWISE NOTED, THE FOLLOWING CONDITIONS SHALL BE MET PRIOR TO ISSUANCE OF BUILDING PERMITS:

1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to

intrude into the greenway area. STAFF CONTACT: Chris Davies, Engineering Division.*

2. The applicant shall obtain written approval from Unified Sewerage Agency of Washington County for connection to the Unified Sewerage Agency trunk line prior to issuance of aPpblic [sic] improvement permit. A copy of the permit shall be submitted to the City of Tigard Engineering Department.
STAFF CONTACT: Greg Berry, Engineering Division.

3. The applicant shall submit a revised site plan showing: 1) building plans which show the proposed design and location of outdoor lighting and rooftop mechanical equipment; 2) the location and screening of the trash disposal area; 3) the relocation of the phase one building outside of the greenway area and out of conflict with existing sanitary sewer easements; and 4) a minimum of two appropriately located designated handicapped accessible parking spaces. STAFF CONTACT: Jerry Offer, Planning Division.

4. The applicant shall submit a revised landscaping plan showing: 1) screening for the trash disposal area; and 2) the installation

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* This condition has been amended per Council action on September 10, 1991. The following sentence was removed: "A monumented boundary survey showing all new title lines, prepared by a registered professional land surveyor, shall be submitted to the City for review and approval prior to recording."

of street trees along the Main Street frontage of the site to the east of the proposed driveway. For purposes of calculating the required landscaped area (15%), the dedicated land noted in Condition No. 1. above may be included. The City shall be responsible for landscaping the land dedicated to the public. STAFF CONTACT: Ron Bunch, Planning Division.

5. The City Engineering Division shall locate and clearly mark the 100-year floodplain boundary prior to commencement of construction. Floodplain boundary markers shall be maintained throughout the period of construction. STAFF CONTACT: Chris Davies, Engineering Division.

6. A demolition permit shall be obtained prior to demolition or removal of any structures on the site. The applicant shall notify Northwest Natural Gas prior to demolition. STAFF CONTACT: Brad Roast, Building Division.

7. The applicant shall install an 8-foot tall solid plywood fence behind the sidewalk/public right-of-way along SW Main Street (from the southwestern property line to a minimum of 20 feet beyond the new building to the northeast) prior to start of construction and must remain until all construction is complete (Uniform Building Code section 4407(c). STAFF CONTACT: Brad Roast, Building Division.

8. As part of the improvement plans the applicant shall submit details and calculations that show the change in the amount of impervious surface area created by this

development. In addition, the fee-in-lieu for water quality shall be paid. STAFF CONTACT: Chris Davies, Engineering Division.

9. An erosion control plan shall be provided as part of the improvement drawings. The plan shall conform to "Erosion Control Plans – Technical Guidance Handbook, November 1989."

10. The applicant shall submit evidence that the proposed building does not encroach upon the sanitary sewer easements that cross the parcel or, alternately, submit evidence that the Unified Sewerage Agency does not object to any proposed encroachment. STAFF CONTACT: Chris Davies, Engineering Division.

UNLESS OTHERWISE NOTED, THE FOLLOWING CONDITIONS SHALL BE SATISFIED PRIOR TO ISSUANCE OF AN OCCUPANCY PERMIT:

11. All landscaping materials and other proposed site improvements noted in Conditions 3. and 4 shall be installed or financially assured prior to occupancy of any structure. STAFF CONTACT: Jerry Offer, Planning Division.

12. All new signage must receive approval by the Planning Division prior to being erected. STAFF CONTACT: Ron Pomeroy, Planning Division.

13. The two nonconforming, amortized billboard signs and support structures shall be completely removed from the property prior to occupancy of phase one of this

development OR the applicant shall submit any applicable legal document which prohibits their removal. STAFF CONTACT: Ron Pomeroy, Planning Division.

14. As a condition of the occupancy permit, the applicant shall be required to replace any portions of the existing sidewalk along Main Street which are damaged or in poor repair and to reconstruct any existing curb cuts which are being abandoned. Prior to any work being started within the public Right-of-Way the applicant shall obtain a Street Opening permit from the Engineering Department. STAFF CONTACT: Chris Davies, Engineering Division.

15. The existing roof sign shall be permanently removed from the subject property within 45 days of the issuance of the Occupancy Permit for the new building. STAFF CONTACT: Ron Pomeroy, Planning Division.

THIS APPROVAL SHALL BE VALID FOR EIGHTEEN (18) MONTHS FROM THE DATE OF THE FINAL DECISION.

The Planning Commission's decision eliminates condition of approval #9 of the Director's designee's decision. That condition stated that a Traffic Impact Fee was required to be paid upon issuance of a building permit for the proposed building on the site. While the Commission does not find that this statement regarding the Traffic Impact Fee needs to be a condition of approval of the application,

this action does not relieve the applicant of the responsibility of compliance with Washington County Ordinance 379 related to the county-wide Traffic Impact Fee program.

It is further ordered that the applicant be notified of the entry of this order.

PASSED: This 15 day of July, 1991, by the Planning Commission of the City of Tigard.

/s/ Milt Fyre
Milt Fyre, President
Tigard Planning Commission

APPENDIX H

Chapter 197

Comprehensive Land Use Planning Coordination

1991 OREGON REVISED STATUTES

197.010 Policy. The Legislative Assembly declares that, in order to assure the highest possible level of liveability in Oregon, it is necessary to provide for properly prepared and coordinated comprehensive plans for cities and counties, regional areas and the state as a whole. These comprehensive plans:

(1) Must be adopted by the appropriate governing body at the local and state levels;

(2) Are expressions of public policy in the form of policy statements, generalized maps and standards and guidelines;

(3) Shall be the basis for more specific rules and land use regulations which implement the policies expressed through the comprehensive plans;

(4) Shall be prepared to assure that all public actions are consistent and coordinated with the policies expressed through the comprehensive plans; and

(5) Shall be regularly reviewed and, if necessary, amended to keep them consistent with the changing needs and desires of the public they are designed to serve. [1973 c.80 § 2; 1981 c.748 § 21a]

197.175 Cities and counties planning responsibilities; rules on incorporations; compliance with goals. (1) Cities and counties shall exercise their planning and zoning responsibilities, including, but not limited to, a city or special district boundary change which shall mean the annexation of unincorporated territory by a city, the incorporation of a new city and the formation or change of organization of or annexation to any special district authorized by ORS 198.705 to 198.955, 199.410 to 199.519 or 451.010 to 451.600, in accordance with ORS chapters 196 and 197 and the goals approved under ORS chapters 196 and 197. The commission shall adopt rules clarifying how the goals apply to the incorporation of a new city. Notwithstanding the provisions of section 15, chapter 827, Oregon Laws 1983, the rules shall take effect upon adoption by the commission. The applicability of rules promulgated under this section to the incorporation of cities prior to August 9, 1983, shall be determined under the laws of this state.

(2) Pursuant to ORS chapters 196 and 197, each city and county in this state shall:

(a) Prepare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission;

(b) Enact land use regulations to implement their comprehensive plans;

(c) If its comprehensive plan and land use regulations have not been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the goals; and

(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations.

(3) Notwithstanding subsection (1) of this section, the commission shall not initiate by its own action any annexation of unincorporated territory pursuant to ORS 222.111 to 222.750 or formation of and annexation of territory to any district authorized by ORS 198.010 to 198.430 and 198.510 to 198.915 or 451.010 to 451.600. [1973 c.80 §§ 17, 18; 1977 c.664 § 12; 1981 c.748 § 15; 1983 c.827 § 3; 1989 c.761 § 18; 1991 c.817 § 21]

APPENDIX I

OREGON ADMINISTRATIVE RULES

OAR 660-15-000(5)

5. OPEN SPACES, SCENIC AND HISTORIC AREAS, AND NATURAL RESOURCES

GOAL

To conserve open space and protect natural and scenic resources.

Programs shall be provided that will

(1) insure open space.

(2) protect scenic and historic areas and natural resources for future generations, and

(3) promote healthy and visually attractive environments in harmony with the natural landscape character. The location, quality and quantity of the following resources shall be inventoried:

a. Land needed or desirable for open space;

b. Mineral and aggregate resources;

c. Energy sources;

d. Fish and wildlife areas and habitats;

e. Ecologically and scientifically significant natural areas, including desert areas;

f. Outstanding scenic views and sites;

g. Water areas, wetlands, watersheds and groundwater resources;

h. Wilderness areas;

i. Historic areas, sites, structures and objects;

j. Cultural areas;

k. Potential and approved Oregon recreation trails;

l. Potential and approved federal wild and scenic waterways and state scenic waterways.

Where no conflicting uses for such resources have been identified, such resources shall be managed so as to preserve their original character. Where conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal.

Cultural Area – refers to an area characterized by evidence of an ethnic, religious or social group with distinctive traits, beliefs and social forms.

Historic Areas – are lands with sites, structures and objects that have local, regional, statewide or national historical significance.

Natural Area – includes land and water that has substantially retained its natural character and land and water that, although altered in character, is important as habitats for plan, animal or marine life, for the study of its natural historical, scientific or palcontological features, or for the appreciation of its natural features.

Open Space – consists of lands used for agricultural or forest uses, and any land area that would, if preserved and continued in its present use:

(a) Conserve and enhance natural or scenic resources;

(b) Protect air or streams or water supply;

(c) Promote conservation of soils, wetlands, beaches or tidal marshes;

(d) Conserve landscaped areas, such as public or private golf courses, that reduce air pollution and enhance the value of abutting or neighboring property;

(e) Enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries or other open space;

(f) Enhance recreation opportunities;

(g) Preserve historic sites;

(h) Promote orderly urban development.

Scenic Areas – are lands that are valued for their aesthetic appearance.

Wilderness Areas – are areas where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. It is an area of undeveloped land retaining its primeval character and influence, without permanent improvement or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) may also contain ecological, geological, or other features or scientific, educational, scenic, or historic value.

OAR 660-15-000(12)

12. TRANSPORTATION

GOAL

To provide and encourage a safe, convenient and economic transportation system.

A transportation plan shall (1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian; (2) be based upon an inventory of local, regional and state transportation needs; (3) consider the differences in social consequences that would result from utilizing differing combinations of transportation modes; (4) avoid principal reliance upon any one mode of transportation; (5) minimize adverse social, economic and environmental impacts and costs; (6) conserve energy; (7) meet the needs of the transportation disadvantaged by improving transportation services; (8) facilitate the flow of goods and services so as to strengthen the local and regional economy; and (9) conform with local and regional comprehensive land use plans. Each plan shall include a provision for transportation as a key facility.

Transportation – refers to the movement of people and goods.

Transportation Facility – refers to any physical facility that moves or assists in the movement of people and goods excluding electricity, sewage and water.

Transportation System – refers to one or more transportation facilities that are planned, developed, operated and maintained in a coordinated manner to supply continuity

of movement between modes, and within and between geographic and jurisdictional areas.

Mass Transit – refers to any form of passenger transportation which carries members of the public on a regular and continuing basis.

Transportation Disadvantage – refers to those individuals who have difficulty in obtaining transportation because of their age, income, physical or mental disability.

APPENDIX J

TIGARD
COMPREHENSIVE PLAN

VOLUME TWO
FINDINGS, POLICIES AND IMPLEMENTATION STRATEGIES

October, 1982
Revised February, 1983
Revised November, 1983
Revised December, 1987

. . . .

3. NATURAL FEATURES AND OPEN SPACE

. . . .

3.2 FLOODPLAINS

FINDINGS

- The objective of the City is to use the detailed information gathered on floodplains from the U.S. Army Corps of Engineers, and develop policies to:

. . . .

3. Emphasize the retention of a vegetative buffer along streams and drainageways, to reduce runoff and flood damage and provide erosion and siltation control.

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POLICIES

. . . .

3.2.4 THE CITY SHALL REQUIRE THE DEDICATION OF ALL UNDEVELOPED LAND WITHIN THE 100-YEAR FLOODPLAIN PLUS SUFFICIENT

OPEN LAND FOR GREENWAY PURPOSES SPECIFICALLY IDENTIFIED FOR RECREATION WITHIN THE PLAN.

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3.5 PARKS, RECREATION AND OPEN SPACE

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POLICIES

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3.5.3 THE CITY HAS DESIGNATED THE 100-YEAR FLOODPLAIN OF FANNO CREEK, ITS TRIBUTARIES, AND THE TUALATIN RIVER AS GREENWAY, WHICH WILL BE THE BACKBONE OF THE OPEN SPACE SYSTEM. WHERE LANDFILL AND/OR DEVELOPMENT ARE ALLOWED WITHIN OR ADJACENT TO THE 100-YEAR FLOODPLAIN, THE CITY SHALL REQUIRE THE DEDICATION OF SUFFICIENT OPEN LAND AREA FOR GREENWAY ADJOINING AND WITHIN THE FLOODPLAIN.

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8. TRANSPORTATION

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8.4 PEDESTRIAN AND BICYCLE WAYS

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IMPLEMENTATION STRATEGIES

1. The City shall review each development request adjacent to areas proposed for pedestrian/bike pathways to ensure that the adopted plan is properly implemented, and require the necessary easement or dedications for the pedestrian/bicycle pathways.

APPENDIX K

TIGARD
COMMUNITY DEVELOPMENT CODE

TITLE 18

ZONING

. . . .

Chapter 18.120

SITE DEVELOPMENT REVIEW

. . . .

18.120.180 Approval Standards

A. The Director shall make a finding with respect to each of the following criteria when approving, approving with conditions, or denying an application.

. . . .

8. Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.